Petition

81-1820

No. A-739

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

IN RE:
CORRUGATED CONTAINER ANTITRUST LITIGATION
MDL Docket No. 310

CFS CONTINENTAL, INC.; HAROLD FREUND BAKING CO. OF SAN JOSE; HAROLD FREUND BAKING CO. OF FLORIDA; HAROLD FREUND BAKING CO. OF HAWAII, INC.; BARG & FOSTER, INC.; MELSTER CANDIES, INC.; ALLIED VAN LINES, INC.; and WITTEK GOLF SUPPLY CO., INC.,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Whether the court of appeals correctly held that the district court did not clearly abuse its broad discretion in approving as fair, reasonable and adequate partial class action settlements providing for the payment of nearly $300,000,000 to the plantiff class and subclass based on an evidentiary record that included voluminous economic data, affidavits and live testimony taken during a two day evidentiary hearing.

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Respondents-plaintiffs respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.[1]

STATEMENT OF THE CASE

The Petition seeks review by this Court of settlements aggregating nearly $300,000,000[2]—reached with twenty-two of the original 37 defendants in the Corrugated Container Antitrust Litigation, M. D. L. 310. Subsequently, settlements were reached with all but one of the remaining defendants. The case against the lone non-settling defendant, The Mead Corporation, went to trial, and after approximately forty-five trial days, a jury returned a special verdict in favor of plaintiffs.

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1. This Brief in Opposition is respectfully submitted by the plaintiffs-class representatives in the *Corrugated Container Antitrust Litigation*, M. D. L. 310 (S. D. Tex.). The class representative plaintiffs are Adams Extract Company, Atlas Container Co., Inc., Bert Paley, Ltd., Bodines, Inc., Grist Mill Company, Haeger Potteries, Inc., Jefferson Orchards, Inc., Northland Aluminum Products, Inc., Rollins Container, Inc., Sambo's Restaurants, Inc., Tierra Royal Potteries, Inc., Westside Paper Company and Winona Industries, Inc. In compliance with Rule 28.1 of this Court, please note that After Six, Inc. is a parent company of Bert Paley, Ltd. The plaintiff certified class consists of an estimated 200,000 persons in the United States who purchased corrugated containers or corrugated sheets from the defendants (or their subsidiaries or affiliates) during the period from January 1, 1960 through January 25, 1978.

2. Interest has been accruing at prevailing rates since the settlements were entered, more than three years ago.

These settlements (1) were approved by the district court after a two-day evidentiary hearing was held, and (2) were affirmed by the court of appeals after the issues were twice briefed and argued to it.

The complaints in this multidistrict litigation alleged a single price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1, among 37 defendants affecting the prices of corrugated containers and sheets throughout the United States. Each of the defendants were producers of corrugated containers and sheets, except one—The Fibre Box Association, the industry trade association.

A. The Classes

This litigation and these settlements involve a class action brought pursuant to Rule 23(a) and (b)(3), Federal Rules of Civil Procedure. In September, 1978, the action was certified as a single nationwide class comprised of all direct purchasers of corrugated containers and sheets. (D 121).[3] Thereafter, upon the motion of an independent sheet plant [4]—a purchaser primarily of corrugated sheets [5]

3. Reference to "D" herein is to the record as it is indexed in district court's docket.

4. The motion was filed by Great Northern Packaging Corp. and Huron Packaging Corp., sister companies. The Plaintiffs' Steering Committee filed a response to that motion stating that: (1) at the time of the pretrial conference (October 17, 1978) at which the motion was first raised, "the Steering Committee expressed their disagreement with that motion"; and (2) "without conceding the legal or factual merits of the pending motion, Plaintiffs' Steering Committee does not oppose the designation of a subclass of sheet plants. . . ."

5. Some members of the sheet plant subclass buy *both* corrugated sheets and corrugated containers; some members of the container purchaser subclass buy *both* corrugated sheets and corrugated containers. The same plants of defendants manufacture

—the district court created two subclasses within and as part of the single original class: (1) independent sheet plants (hereinafter "sheet plant subclass"); and (2) all other direct purchasers of corrugated containers and sheets (hereinafter "container purchaser class"). (Pretrial Order No. 7, December 26, 1978, D. 278). *The petitioners are members of the container purchaser subclass.*

The two subclasses described above were created by the district court "out of an abundance of caution,[6] (Pet. App. at A13) not because any actual conflict was found to exist between the two subclasses.

B. The Settlements

The settlements for which the Petition seeks review fall into three categories:

1. The Settlements Negotiated Before Class Certification

Two settlements (with defendants St. Regis Paper Co. and International Paper Co.) were reached in the summer of 1978 while the plaintiffs' class action motion was pending before the district court. These settlements, totalling $10,000,000, were on behalf of a single plaintiff class. These settlements were negotiated by a Plaintiffs'

5. (Cont'd.)

both corrugated containers and corrugated sheets. The same personnel of defendants price and sell respectively *both* corrugated containers and corrugated sheets.

6. The district court recognized that at that point in time, it was not fully familiar with the facts of the case. *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. ¶ 62,690 at p. 77,882 (S. D. Tex. 1979) and Pet. App. at A. 50 n. 16. In contrast, at the time the district court preliminarily approved the settlements involved in this petition, it had presided over the related criminal trial and was much more familiar with the corrugated industry. *Id.* at p. 77,881.

Steering Committee, appointed by the district court and explicitly authorized to conduct settlement negotiations.[7] The Steering Committee was comprised solely of attorneys representing plaintiffs which eventually belonged to the container purchaser subclass. No attorney representing a sheet plant was a member of the Plaintiffs' Steering Committee. Before any negotiations were actually begun, the Committee advised the district court and obtained its explicit permission to undertake such negotiations. All members of the Steering Committee as well as *all* plaintiffs' counsel, including the only counsel representing a sheet plant, were kept fully and currently advised of the negotiations. These settlement agreements were signed only after they had been approved by the Steering Committee and by all plaintiffs' counsel, including the only counsel at that time representing a sheet plant.[8]

2. Settlements Reached After Class Certification But Before the Establishment of the Sheet Plant Subclass

Between the time the district court's certification of a single plaintiff class and the district court's establishment of a sheet plant subclass on December 26, 1978, nine settlements aggregating more than $68 million were negotiated and approved by Plaintiffs' Steering Committee on behalf of the single plaintiff class. At a later time, an allocation of those funds was negotiated between counsel who exclusively represented the container purchaser sub-

7. Pretrial Order No. 2, filed December 21, 1977. (D. 2).

8. The history of the settlement negotiations was chronicled before the district court in the Memorandum of Class Plaintiffs in Support of Preliminary Approval of Settlements, filed April 16, 1979 (D. 591), and in affidavits filed on behalf of defendants St. Regis (D. 237) and International Paper (D. 236).

class and counsel who exclusively represented the sheet plant subclass.

3. The Settlements Negotiated After the Creation of the Sheet Plant Subclass

The district court created the sheet plant subclass on December 26, 1978, and appointed separate representative plaintiffs for that subclass. (D. 278). The criminal trial was scheduled to begin in less than a month, on January 22, 1979,[9] and its imminent commencement was at that point creating daily increasing pressure on the remaining non-settling defendants. The time for further settlement negotiations was ripe; yet the newly-appointed representatives for the sheet plant subclass declined to join in further negotiations, although invited by the Steering Committee to do so.[10] (Hearing of December 3, 1979, Tr. at 119) (D. 1570). Since the Steering Committee believed that delay would be a grave mistake, negotiations continued, beginning January 5, 1979, but only on behalf of the container-purchaser subclass.

In the period January 5, 1979, to the beginning of the criminal trial, January 22, 1979, eleven more settlements were concluded, aggregating nearly $220 million. These settlements, while binding only upon the container purchaser subclass, earmarked up to $14.9 million as subject to a possible claim by the sheet plant subclass in the event the latter elected to participate in these settlements and was permitted to do so by the court. Eventually the

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9. In the criminal trial, which proceeded for 14 weeks, a jury acquitted all defendants who stood trial after only three hours of deliberation.

10. The sheet plant representatives requested a 30-day hiatus in all settlement negotiations, which would have extended well beyond the beginning of the criminal trial.

sheet plant subclass did petition to participate in these settlements, and the court approved an allocation of $11 million from the earmarked funds to that subclass.

In the district court, only a handful of the approximately 200,000 class members objected to the settlement, alleging, *inter alia,* for the first time that a conflict of interest existed between the container purchaser subclass and the sheet plant subclass and urging that the settlements could not be approved. These arguments have been rejected by every court which has heard them. Both the district court and the court of appeals found that the two subclasses had a unity of interest—not antagonistic interests—in negotiating settlements with the defendants and that the conflict of interests as *alleged* by the petitioners did not exist; and that even assuming *arguendo* that divergences in interests existed, those divergences did not relate to any settlement negotiations and caused no prejudice to either subclass, either in the negotiations or in the allocation provisions of the post-January 5, 1979 settlements. The district court further found there was no "impropriety or even a superficial appearance of impropriety." (Pet. App.[11] at A15; A51-A56).

11. "Pet. App." refers to Petitioners' Appendix.

REASONS FOR DENYING THE WRIT

The Petition fails to state any reason for granting certiorari. Rule 17 of this Court provides:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners have shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unsual departure from the normal course of judicial proceedings.

To the contrary, it is respectfully submitted that the only questions which could properly be presented in these proceedings, namely, whether the court of appeals correctly held that the district court acted within its broad

discretion when it approved the settlements as fair, adequate and reasonable, whether the record sufficiently supports the conclusions that no conflict of interest existed or tainted the settlement negotiations, or alternatively, whether the record supports the conclusion that if any alleged conflict existed, it did not prejudice the interests of the container purchaser subclass.[12] Petitioners also fail to show any reason why this Court should review the decisions of the court of appeals which affirmed the district court's holdings. Moreover, petitioners fail to show that the due process provisions of the Fifth Amendment of the United States Constitution have been violated, an issue mentioned for the first time in this case in their Petition. Accordingly, the Petition raises no questions which satisfy the requirements or spirit of Rule 17.

1. There Is No Conflict of Interest Present in This Case; Both the District Court and the Court of Appeals Concurred in This Holding

Certiorari is rarely granted ". . . to review evidence and discuss specific facts." *U. S. v. Johnston*, 268 U. S. 220, 227 (1925). Review is less likely where the facts found by the district court receive the concurrence of the court of appeals. This Court has repeatedly pronounced that ". . . it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Immigration Director*, 385 U. S. 630, 635 (1967).[13]

12. Petitioners are all members of the container purchaser subclass and do not purport to argue the rights of the sheet plant subclass before this Court.

13. *Citing, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275. This Court in *Benenyi, supra*, 385 U. S. at 636 explained the policy behind the "two court" rule as follows:

> The policy underlying the "two-court" rule is obvious. This Court possesses no empirical expertise to set against the careful

After a two-day evidentiary hearing, the district court concluded that no conflict of interest existed at the settlement negotiation stage with respect to either the container purchaser subclass or the sheet plant subclass. (Pet. App. at pp. A10-A15). The court of appeals affirmed this finding, both with respect to the pre-January 5, 1979, settlements and the post-January 5, 1979, settlements. (Pet. App. at A51, A52, A55, A56 n. 23). The Petition asks this Court to review the record to determine whether the factual findings by both courts below were clearly erroneous.

Although petitioners argue that a conflict existed, their actions prior to the issue of settlement approval are entirely inconsistent with that claim. At least one petitioner herein, Wittek Golf Supply Co., Inc. ("Wittek") and its counsel joined the Unified and Consolidated Complaint which alleged a single class of purchasers of "corrugated containers and corrugated sheets from any defendant" (Pet. App. at A189) and moved for the certification of that class. At no time up to that stage in the litigation did Wittek or petitioners' counsel raise with the district court the existence of any conflict of interest between sheet plants and other purchasers of corrugated containers and sheets. Although Wittek's counsel attended the argument on class certification, he did not and never has moved for the creation of separate subclasses for container purchasers and sheet plants.

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13. (Cont'd.)

and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resultion.

After the single class was certified, the trial court directed that thirteen active class representatives be selected from among all the class plaintiffs. On October 26, 1978, an order was entered appointing twelve container purchasers and one sheet plant—Atlas Container Co., Inc. —as the thirteen class representatives. (Pl. App., Exh. N) (D. 184). No one, including petitioner Wittek and petitioners' counsel, objected to Atlas Container being designated as a class representative.[14] When a sheet plant filed a motion to create separate subclasses, Wittek and its counsel did not respond; they did not even support that motion on the record. Thus, prior to hearings on settlement approval, no petitioner or their counsel complained to the district court of any conflict of interest.

Petitioners have pointed to no "very obvious and exceptional showing of error." Indeed, they have pointed to no conflict of interest.[15] As the court of appeals recognized after reviewing both objectors' appellate briefs and their submissions to the district court, both subclasses had a unified or common goal "to cause defendants to agree to pay substantial compensation in exchange for the most limited possible release. . . ." (Pet. App. at A51). But the court of appeals did not stop its inquiry at that point. It then *affirmatively* answered the following questions:

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14. Petitioners' counsel, ostensibly active in the litigation as a Steering Committee member, had access to all fruits of discovery and to the evidence adduced in the related criminal case. He has pointed to nothing within that mass of materials to support the allegations of conflict.

15. To the extent petitioners have alleged conflicts, they relate to alleged conflicts prejudicial to the sheet plant subclass, not to the container purchaser subclass of which petitioners are members. In a separate decision for which no review is sought, the court of appeals found that the sheet plant subclass was adequately represented and no conflict of interests existed. *In re Corrugated Container Antitrust Litigation*, 659 F. 2d 1337, 1339-40 (5th Cir. 1981).

> We next consider whether the negotiators, despite the uniformity of the two subclasses' settlement interests, somehow sacrificed, advertently or inadvertently, the interests of one subclass for those of the other. . . . Neither class suggests that this inadequacy resulted from a tradeoff of its rights in order to realize the interests of the other class." (Pet. App. at A52).

Petitioners have pointed to nothing in the record to show these conclusions of both the district court and the court of appeals to be obviously erroneous.

In an attempt to demonstrate an alleged conflict of interest on the part of the container purchaser subclass' counsel, petitioners have had to reach outside the pleadings. For example, petitioners state:

> As sellers of corrugated containers, sheet plants participated in the corrugated container conspiracy to the detriment and injury of container purchasers. (Petition at pp. 14-15).

Of course, nothing in or outside the record supports this contention. Moreover, even assuming *arguendo* the alleged conflict existed, petitioners' contention is irrelevant because container purchasers did not name a single member of the sheet plant subclass as a defendant or conspirator, and made no claim against independent sheet plants. An issue not present in a case cannot be the basis of a conflict of interest. *In re Fine Paper Antitrust Litigation*, 82 F. R. D. 143, 151 (E. D. Pa. 1979).

Petitioners have also plucked out of context isolated quotations from various parts of the record below in an attempt to illustrate "admitted" conflicts of interest between the container purchaser subclass and the sheet plant subclass. (*See* Petition, at pp. 4 nn. 2, 5.) Contrary to the impression which petitioners wish to create, no counsel representing either subclass ever conceded that a conflict

of interest existed between the subclasses with respect to the settlements, except with respect to the issue of allocation of the settlement fund between the two subclasses.[16] Indeed, counsel for Atlas Container Company (a sheet plant representative, testified:

> Lastly, with respect to settlement, the settlements that have been negotiated to date involve everybody and it is contemplated, even in the order presented to the Court, that the subclass of sheet plants would operate within the whole *except in those areas where an expressed [sic] conflict arose* and the sheet plants had to be represented independently. *That would occur in settlement, your Honor, where there has to be an allocation of the particular funds involved.* (Pet. App. at A206) [Emphasis added]

Representatives of Plaintiffs' Steering Committee: (a) advised the court that the container purchasers did indeed have an interest in showing that the conspiracy existed both as to container purchasers and as to sheet plants "because of the fact that you couldn't have the conspiracy operate without it." Hearing of December 14, 1978, Tr. (at 106) (D. 499); and (b) advised the court that some container purchasers buy sheets, that ". . . we've alleged a single conspiracy of sheets and boxes. Sheet plants are one of the end users of those sheets, one of the direct purchasers, but there are many in the box class who purchase sheets. . . ." (*Id.* at 107).[17]

16. Indeed, the sheet plant objector (who is not a petitioner herein) admitted in the court of appeals that no actual conflict arose until ". . . those (pre-January 5, 1979) settlements sowed the seeds of conflict between the subclasses." Sheet Plant Objectors' Brief in court of appeals, at 61.

17. While petitioners included in their Appendix pages 99 through 105 of this transcript, they omitted pages 106 and 107 from their Appendix. (Pet. App. at A204-A208).

There is no dispute that once the two subclasses were formed, separate representation for each subclass was required to negotiate the allocation of the settlement funds between those two subclasses. Likewise, there is no dispute that at the time the allocation was negotiated, each subclass was represented by counsel representing that subclass alone. Accordingly, the negotiations relating to allocation between the subclasses of the pre-January 5, 1979 settlements were entirely free from any imagined conflict of interest. *See In re Chickens Antitrust Litigation, supra,* 669 F. 2d at 236-7.

It is also clear that the post-January 5, 1979 settlements were negotiated by counsel representing the container purchaser subclass solely on behalf of the container purchaser subclass. Petitioners' allegation that counsel for the container purchaser subclass negotiated those settlements "for both container purchasers and sheet plants" (Petition at p. 17) totally ignores the reality of the circumstances involved and the express terms of the settlement agreements. The settlements did allow the sheet plants to participate in those settlements up to an amount not exceeding approximately $14.9 million, but the sheet plants had the option to "take it or leave it." The container purchaser subclass acted in what it perceived to be its best interests, while the sheet plant subclass was free to pursue what it perceived to be its best interests.[18] The court of appeals analyzed the allegation of conflict of interest on the part of container purchasers' counsel with respect to the post-January 5, 1979, settlements as follows:

> . . . The logic of this position [that a conflict of interest existed] eludes us. By the time of these settle-

18. As the district judge stated to an attorney for a sheet plant: ". . . you're free now to go after those people and make your own settlements, as I see it." Transcript of May 16, 1979, at p. 117.

> ments, the container purchasers were grouped into a separate subclass and the negotiators after January 5, were negotiating for the container purchaser subclass only. (Pet. App. at A55).

To bolster their argument, petitioners refer to "a *sub rosa* agreement that allocated to the sheet plant subclass and effectively stripped the container purchaser subclass of their vested right to a portion of the settlement funds. . . ." (Petition at p. 17; *see also*, p. 7). This is a bold *misstatement*, with no support in the record. Accordingly, reference thereto should be disregarded. Respondents vigorously deny such allegation, just as they vigorously denied it in the courts below. The record on this point supports respondents. In the Response of Container Purchaser Class Representatives to Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements (D. 659), respondents expressly stated:

> In fact, not a single penny of the post-January 5th settlements will be allocated to the sheet plant subclass *unless the representatives of that subclass apply* to the Court for such an allocation and unless the Court itself orders the allocation. And the container purchaser subclass remains absolutely *free to oppose any allocation* to the sheet plant subclass from the post-January 5th settlements or to engage in arms-length negotiations with the sheet plant subclass as to the extent, if any, of such allocation. [Emphasis added]

Petitioners also mischaracterize the letters from two settling defendants relating to their position that the container purchaser subclass could not challenge the application of the sheet plant subclass to participate in the post-January 5, 1979 settlements. (Petitioners at page 8; Pet. App. at A255-260). To the contrary and as the foregoing

quotation demonstrates, container purchaser representatives understood that they had the absolute right to challenge any application of the sheet plant subclass. Indeed, it was that understanding stated in court that evoked the two letters relied upon by petitioners. In any event, because the district court found that an arms length agreement had been negotiated between the two subclasses as allocating $11 million of the post-January 5, 1979, settlement funds to the sheet plants (Pet. App. at A157), petitioners' argument is moot.

Petitioners also rely upon the affidavit of Mr. Kowall, president of a sheet plant, which was filed by sheet plants in support of the creation of a sheet plant subclass. (Pet. App. at pp. A200-A203). Mr. Kowall concluded that sheets and containers are the subject of two conspiracies because the price-fixing of sheets "occurred at the *corrugator* level" and the conspiracy relating to containers "occurred at the container-converter level." *Id.* Mr. Kowall's depiction is contrary to the allegations of the Unified and Consolidated Complaint filed in these actions and contrary to the Government's theory in the related criminal case. The Government described the conspiracy as follows:

> The combination and conspiracy encompassed *both* the sale of corrugated sheets to customers who purchased corrugated containers, and the sale of corrugated sheets to "sheet" plants. [Emphasis added]
>
> Department of Justice Letter dated July 21, 1978, addressed to "All Attorneys in Charge", at p. 4 (Referenced in D. 187)

Given that the same corrugator plants manufactured sheets and containers and the same employees for those plants priced and sold sheets and containers, Mr. Kowall's assertions are meaningless.

With the exception of petitioners and those few who joined with them in objecting below, no other container purchasers have objected to the adequacy of representation *after* the settlements were negotiated; not approximately 200,000 absent class members and not the settling defendants who required adequate class representation in order to bind absent class members.[19] Both the district court and the court of appeals found the class representation to be adequate and no conflicts of interest to exist. Petitioners have not shown "a very obvious and exceptional showing of error" with respect to these findings.

2. The Standard Applied by the Court Below to Determine Whether a Disabling Conflict of Interests Existed Was Not in Conflict With Standards Applied by Other Circuits or by This Court

In finding that no conflict of interest existed on the part of those counsel who negotiated settlements on behalf of the container purchaser subclass, both the district court and the court of appeals applied proper conflict of interest standards which are not in conflict with the rulings of this Court or of other circuits.

A conflict of interest on the part of an attorney can only occur if the attorney represents two clients, the representation of the interests of one being adverse to the interests of the other. The Canons of Professional Ethics define conflicting interests as:

> . . . a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend that which duty to another client requires him to oppose.
>
> Canons of Professional Ethics, Canon 6, 92.

The First Circuit has defined a conflict of interests as follows:

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19. *Gonzales v. Cassidy*, 474 F. 2d 67 (5th Cir. 1973).

> The term "conflict of interest" bespeaks a situation in which regard for one duty tends to lead to disregard for another.
>
> *U. S. v. Miller*, 463 F. 2d 600, 602 (1st Cir. 1972).

The cases are legion that a conflict arises only when some antagonism of interests arises. *E.g., Berman v. Narragansett Racing Ass'n*, 414 F. 2d 311, 317 (1st Cir. 1969), *cert. denied*, 396 U. S. 1037 (1970); *The Florida Bar v. Moore*, 194 So. 2d 264, 269 (Fla. 1966); *Zimmer v. Gudmundsen*, 5 N. W. 2d 707, 715 (Neb. 1942); *Jedwabney v. Philadelphia Transp. Co.*, 390 Pa. 231, 135 A. 2d 252, 254 (Pa. 1957); *Spindle v. Chubb/Pacific Indem. Group*, 89 Cal. App. 3d 706, 713 (Cal. App. 1979).

Petitioners have not pointed to any conflict between the courts below and other circuits concerning what constitutes a conflict of interests. Indeed, the cases on which petitioners rely are consistent with the conflict of interest standards applied by the Fifth Circuit herein, although their factual settings were drastically different. *See Hansberry v. Lee*, 311 U. S. 32 (1940); *In re General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106 (7th Cir.), *cert. denied*, 444 U. S. 870 (1979). In *Hansberry v. Lee, supra*, plaintiffs commenced a representative suit on behalf of approximately 500 landowners who were parties to a restrictive agreement. Some parties to the agreement sought to enforce it while others wished to resist performance and challenge its validity. Obviously, in *Hansberry*, the dual interests sought to be represented were adverse to each other. No such adversity exists in this case.

In *In re General Motors Corporation Engine Interchange Litigation, supra*, several classes were involved. An attorney not authorized by the court to do so nego-

tiated a settlement for all classes. While purporting to settle for all classes, the settlement "contemplated the abandonment of the prosecution of post-April 10 class members." 594 F. 2d at 1128. Thus, a conflict existed among class members who would receive payments and those who would not, even though all class members' claims were to be dismissed. No such conflict exists in this case.

The circumstances of the case *sub judice* and the rulings of the district court and court of appeals are completely consistent with the rulings of this Court and other circuits.[20]

The Fifth Circuit, in affirming the district court's conclusion that no conflict of interests existed, applied the proper standard:

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20. Petitioners also allege the decision of the court of appeals is in conflict with another Fifth Circuit decision, *Clark v. Lomas & Nettleton Finance Corp.*, 625 F. 2d 49 (5th Cir. 1980). Generally, a conflict between decisions rendered by different panels of the same Court of Appeals is not a basis for granting a writ of certiorari. *Davis v. United States*, 417 U. S. 333, 340 (1974). Moreover, there is no conflict with the *Lomas & Nettleton* decision. That case involved companion shareholders' direct and derivative suits. The directors who were either defendants in the direct case or were controlled by defendants in the direct case settled the derivative case. The court found these directors to be in a conflict of interests with the corporation and therefore voided the settlement of the derivative suit. Consistent with the court of appeals below, the court in *Lomas & Nettleton* focused the "conflicts" inquiry upon whether the negotiations of the settlement ". . . stood 'in a dual relation [that] prevent[ed] an unprejudiced exercise of judgment.' *United Copper Securities* [*Company v. Amalgamated Copper Co.*], 244 U. S. [261] at 264 (1917)." 625 F. 2d at 52.

Moreover, a later decision by yet another panel in the Fifth Circuit, *In re Chicken Antitrust Litigation*, 669 F. 2d 228 (5th Cir. 1981), is factually very close to the case *sub judice* and is consistent herewith. It is surprising that petitioners omitted the *Chicken* decision from their petition, particularly since petitioners' counsel entered an appearance in that case.

> . . . whether these interests conflicted at the point of settlement negotiation, and thus deprived either class of the vigorous and unqualified advocacy in settlement negotiations to which both were entitled. In deciding . . . , we must inquire, first, whether the general interests of the subclasses respecting the settlements were the same and amenable to being achieved by unified representation; and, second, whether any specific features of the settlement *sacrificed the interests of one class in favor of the interests of another.* [Emphasis supplied].
>
> Pet. App. at A51.[21]

The foregoing ruling is harmonious with the standards applied by the Seventh Circuit in the *GM Engine Interchange* case, *supra,* 594 F.2d at 1133:

> . . . On the facts of this case, the irregular conduct of the negotiations, the failure of the trial court to examine the irregularities thoroughly, and the evidence in the record indicating that the irregularities *may have damaged the interests of the class* convince us that such a clear showing has been made.[22] [Emphasis added].

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21. Both the district court and the court of appeals recognized that the subclasses may have some divergences of interest, such as proof of impact and damages, but that these divergences did not detract from their unity of interest in negotiating a settlement. The divergent interests relating to impact and damages were resolved by arms length negotiations between counsel for the representatives of each subclass respectively which resulted in a "share and share alike" allocation agreement with respect to the pre-January 5, 1979, settlements and an $11 million allocation agreement with respect to the post-January 5, 1979, settlements.

22. The court of appeals remanded the case to the district court because the record was so inadequate that the court of appeals could not determine "that the negotiations *did not prejudice the interests* of the settlement subclass." *Ibid.* [Emphasis added].

Accordingly, the Fifth Circuit opinion from which petitioners appeal is not in conflict with the decisions of this Court, of any other courts of appeals or with other decisions in the Fifth Circuit with respect to the standards for determining a conflict of interest. Therefore, respondents respectfully urge that no conflict among the circuits exists such as to justify granting the writ of certiorari.

3. The Circumstances in This Case Do Not Raise a Substantial Issue of Due Process Since Representation of Absent Class Members Was Clearly Adequate

Petitioners' allegation of "inadequate due process," an argument created solely to gain review by this Court, is frivolous, particularly under the facts of this case. Indeed, the issue was not raised in the courts below. *Hansberry v. Lee*, 311 U. S. 32 (1940), the case upon which petitioners rely, was not cited to the court of appeals.[23] Moreover, petitioners have not shown circumstances—nor do any exist—that would indicate that absent class members have been inadequately represented.[24]

In any event, petitioners cannot complain of inadequate due process. At least one petitioner and petitioners' counsel joined in the original Consolidated and Unified Complaint, thus accepting the named plaintiffs as class representatives. (Pet. App. at A189). Moreover, at least one petitioner and petitioners' counsel joined in the Joint Motion for Class Certification which resulted in an order

23. The Fifth Circuit, when the issue has been raised before it, has followed *Hansberry v. Lee, supra. See Gonzales v. Cassidy*, 474 F. 2d 67, 74 (5th Cir. 1973).

24. There can be no doubt that the district court recognized its duty to determine that the class was adequately represented:

> The court is entrusted with a heavy responsibility in a class action and has accordingly explored this issue [conflict of interest] at greater length than perhaps it deserves. (Pet. App. at A16)

certifying a single class on behalf of container purchasers as well as sheet purchasers. (D. 121). When notice of the settlements was given to class members, petitioners had the opportunity to exclude themselves if indeed they felt they had not been adequately represented. If petitioners truly believed representation was inadequate and were not simply interested in acting as spoilers for all other class members who desire the settlement to be consummated,[25] they had ample opportunity to opt out of the class action. This opportunity protects petitioners' due process rights.[26] *In re Four Seasons Securities Law Litigation*, 502 F. 2d 834, 843-44 (10th Cir. 1974); *Marshall v. Holiay Magic, Inc.*, 550 F. 2d 1173, 1177 (9th Cir. 1977); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F. 2d 30, 33 (3d Cir. 1971); *Brennan v. Midwestern Union Life Ins. Co.*, 450 F. 2d 999 (7th Cir. 1971); *Kesler v. Hynes & Howes Real Estate, Inc.*, 66 F. R. D. 43, 50 (S. D. Iowa 1975); *Tober v. Charnita, Inc.*, 58 F. R. D. 74, 81 (M. D. Pa. 1973).[27]

It is clear that even if a conflict of interest exists, it will not destroy adequate representation of the class unless that conflict is "clear and such that the interests of the class are placed in significant jeopardy." *Sley v. Jamaica Water & Utilities, Inc.*, 77 F. R. D. 391, 394-5 (E. D. Pa. 1977); *accord, Bartleson v. Dean Witter &*

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25. There are in excess of 200,000 class members. There was only a handful of objectors below. (Pet. App. at A115). In contrast, some of the largest corporations in the country, as class members, have actively supported these settlements. (Pet. App. at A115-A116).

26. Petitioners cannot complain about having an adequate background of information, their counsel having been a member of Plaintiffs' Steering Committee.

27. There is *no* conflict among the circuits on this point of law.

Co., 86 F. R. D. 657, 673 (E. D. Pa. 1980) (Becker, J.[28]). The Ninth Circuit, in *Blackie v. Barrack*, 524 F. 2d 891, 910 (9th Cir. 1975), *cert. denied*, 429 U. S. 816 (1976), expressly found that *Hansberry v. Lee*, *supra*, does not hold that every divergence in interest violates the due process rights of absent class members:

> *Hansberry* does not, however, as defendants seem to assume, dictate that any divergence of interest among class members violates due process (thereby necessarily requiring an identity of interests to satisfy Rule 23's adequacy or representation and typicality requirements). Neither the Rule's requirements nor those of due process are so inflexible. The due process touchstone of adequacy and fairness of representation (*see In re Four Seasons Securities Laws Litigation*, 502 F. 2d 834, 842 (10th Cir. 1974); *Eisen IV*, at 177) must be judged in light of the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; . . . .

Hence, petitioners attempt to raise a constitutional issue of inadequate due process has no substance under the circumstances of this case.

4. The District Court Relied in Part Upon the Very "Price" Based Damage Estimates Propounded by Petitioners in Approving the Settlements

Petitioners argue that the court below erred in basing its approval of the settlements upon a damage estimate based upon the defendants' profits rather than on a damage estimate based upon actual prices charged. Petitioners fail to note that the district court specifically found

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28. Now sitting on the Third Circuit Court of Appeals.

that the damage estimate based upon profits was consistent with the damage estimate based upon prices which was offered by the objectors, petitioners herein. As the Court of Appeals explained:

> Having found the methodology and assumptions of the objectors' experts flawed, the district court corrected those flaws and found that the damage estimate of those experts was not inconsistent with Dr. Hoyt's damage estimate [based upon profits].
>
> Pet. App. at A-170.

After extensive analysis of both a "profit" analysis of damages propounded by proponents of the settlement and a "price" analysis of damages propounded by objectors, the district court specifically based its approval upon both, finding that each analysis corroborated the results of the other:

> The court finds that both methodologies are appropriate for estimating the range of potential recovery in cases such as this. Where, as here, the two methodologies yield consistent results when applied to the same periods, there is no need to accept or reject either one.
>
> Pet App. at A-110.

Since the approval of the settlements was based upon damage estimates propounded by petitioners and was approved on the basis of both a "price" analysis and a "profits" analysis, the district court applied the precise analysis urged by petitioners as appropriate. Petitioners argument that the court below erred as a matter of law in approving the settlements based upon solely a profit

analysis misstates the findings below and raises no issue upon which certiorari may be granted.[29]

5. The District Court Fairly Assessed Plaintiffs' Likelihood of Success by Entering Explicit Findings Weighing the Strengths and Weaknesses of Plaintiffs Case Separately as to Each of Twenty-Two Settling Defendants

As the court of appeals noted "[t]he district court judge, in addition to his discussion of the general difficulties the plaintiffs would face in proving their case, assessed the plaintiffs' likelihood of prevailing against each defendant." Pet. App. at A-172. The court of appeals found "the findings of the district court are clear enough to support its exercise of discretion to approve the settlements." *Id.* Petitioners argue, without any supporting citation, that the district court's findings are so deficient as to constitute reversible error because they purportedly only weighed the "weaknesses of plaintiffs' case" and "an evaluation must fairly weigh both the positive and negative factors which may influence the outcome of trial." Petition at 21.

Not only is petitioners' premise without legal support, it lacks any factual support in the record. The district court's additional findings (Pet. App. at A120-A152) enumerated in detail both the strengths and weaknesses of plaintiffs' case against the settling defendants. For

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29. Respondents would contend that a damage analysis based upon profits would alone present sufficient estimate of damages upon which to base approval of a settlement. In *In re Armored Car Antitrust Litigation*, 472 F. Supp. 1357, 1373 (N. D. Ga. 1979, *aff'd on other grounds*, 645 F. 2d 488 (5th Cir. 1981) the district court approved use of a damage estimate based upon the defendants' profits which was propounded by counsel for petitioners-objectors herein. However, this issue need not be reached herein.

example, in the case of International Paper the court stressed the strength of plaintiffs' case:

> The class' case against International Paper is much stronger than its case against St. Regis. There is fairly extensive evidence which tends to support this defendant's participation in the alleged conspiracy if the initial problems of class certification and nationwide agreement, impact, and damages are resolved in the class' favor. Set against this is the fact that International Paper's profits are generally lower than the average for the industry, . . . and that there is evidence of large shifts of business to and from International Paper, . . . both factors tending to disprove participation in a price-fixing conspiracy. As was the case with St. Regis, the involvement of International Paper in the Container case somewhat diminishes the class' chances of prevailing for the pre-limitations period as against other defendants not involved therein.
>
> Pet. App. at A128-129.

In the case of MacMillan Bloedel, Inc., after review of the record, the district court concluded that there was a ". . . relatively good chance of recovering against MacMillan . . ." (Pet. App. at A145).

Similar findings were made separately as to each of the twenty-two defendants[30] assessing the strengths—where they existed—of plaintiffs' cases and the weaknesses. *See, e.g.*, Boise Cascade Corporation (Pet. App. at A140); Owens-Illinois, Inc. (Pet. App. at A146) and Williamette Industries (Pet. App. at A137).

Thus, petitioners' argument lacks legal support and ignores the explicit findings reflected in the opinions below.

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30. *See*, Pet. App. at A122-A152.

6. The Court of Appeals Applied the Appropriate Standards of Review

Unanimous precedent has held the standard for review of approval of a settlement to be "clear abuse of discretion." *Girsh v. Jepson*, 521 F. 2d 153, 156 (3d Cir. 1975); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F. 2d 799, 801 (3d Cir.), *cert. denied*, 419 U. S. 900 (1974); *Kohn v. American Metal Climax, Inc.*, 489 F. 2d 262, 264 (3d Cir. 1973); *Shlensky v. Dorsey*, 574 F. 2d 131 (3d Cir. 1978); *Cotton v. Hinton*, 559 F. 2d 1326, 1330 (5th Cir. 1977); *Young v. Katz*, 447 F. 2d 431 (5th Cir. 1971); *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 455 (2d Cir. 1974). Petitioners cite no authority to the contrary.

Petitioners argue that the court of appeals incorrectly limited its review of the district court's approval of the settlements to a standard of "abuse of discretion" (Petition at 22); petitioners argue that the court of appeals should have exercised its "independent judgment" because of the purported incorrect application of a general rule of law by the district court.

As demonstrated above, however, the district court applied the correct rule of law in assessing both the adequacy of the representation and the adequacy of the settlements. Moreover, the court of appeals, after extensively reviewing the record, affirmed the district court's findings of the absence of conflict and adequacy of representation. (Pet. App. at A49-A57).

Therefore, even petitioners' unique interpretation of the appellate function would not lead to a result different from that reached by the courts below.

CONCLUSION

No reason having been shown why this Court should issue its writ of certiorari, it is respectfully submitted that the Petition should be denied.

DATED: May 3, 1982.

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Chairman, Vice Chairman, and Members of Plaintiffs' Steering Committee, and Attorneys for the Plaintiff Certified Class, In re Corrugated Container Antitrust Litigation, on Behalf of the Class Representative Plaintiffs.

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Appendix

81-1820 No. A-739

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

IN RE:
CORRUGATED CONTAINER ANTITRUST LITIGATION
MDL Docket No. 310

CFS CONTINENTAL, INC.; HAROLD FREUND BAKING CO. OF SAN JOSE; HAROLD FREUND BAKING CO. OF FLORIDA; HAROLD FREUND BAKING CO. OF HAWAII, INC.; BARG & FOSTER, INC.; MELSTER CANDIES, INC.; ALLIED VAN LINES, INC.; and WITTEK GOLF SUPPLY CO., INC.,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Plaintiffs:

Accurate Metal Weatherstrip Company, Inc.
Adams Extract Company
After Six, Inc.
Al Barker Publishing Co.
The Amberley Greeting Card Co.
Andre-Boudin Bakeries, Inc.
Arcadia Furniture Corp.
Atlas Container Co., Inc.
Austin Products Co.
Bateman Canning Co.
The Beaumont Co.
Bert Paley, Ltd.
Bodines, Inc.
Bookout & Mitchell Supply, Inc.
Bowman Dairy Company, Inc.
Burger King Corp.
Cantrell & Cochrane, Inc.
Carron Manufacturing Co., Inc.
Continental Nut Co.
Cook Distributing Co.
Cook Produce, Inc.
Co-Ordinated Industries, Inc.
Covington Fabrics Corp.
Dean Foods Co.
Dean Foods Products Company
Dean Milk Company, Inc.
Denver Meat Co.

District Hotel Supply, Inc.
Doranne of California d/b/a Embassy Giftwares
Douglas Furniture Corp.
Draper Canning Co., Inc.
Draper-King Cole, Inc.
Dulaney Foods, Inc.
Erie Seating Co.
Falstaff Brewing Company
Fox Deluxe Pizza Co.
Furniture Plastics, Inc.
Gandy's Dairies, Inc.
Gateway Farms, Inc.
General Brewing Co.
Golden Quality Ice Cream Co.
Grace Brewing Co.
Great Northern Packaging Corp.
Green Bay Foods
Griffin & Brand Sales Agency, Inc.
Grist Mill Co.
Haeger Potteries, Inc.
Huron Packaging Corp.
I. Kaplan, Inc.
Ilikon Corporation
International Frozen Foods, Inc.
Iowa Beef Processors, Inc.
ITT Continental Baking Co.
ITT Gwaltney, Inc.
Jefferson Orchards, Inc.
John Inglis Frozen Foods Co.
Keller Street Development Co.
Land O'Lakes, Inc.
Levee Furniture Co.
Liberty Dairy Company
Macomb Pottery Co., Inc.
Maier Brewing Co.
Marathon Enterprises, Inc.

Metro Molding Corporation
Mid-Valley Packing Co., Inc.
Mister B. Greeting Card Co., Inc.
Narragansett Brewing Company
Northland Aluminum Products, Inc.
Nutritional Food Products, Inc.
The Paniplus Co.
Pearl Brewing Company
Pearson Candy Co.
Penthouse Furniture Ltd.
The Pillsbury Co.
Poppin Fresh Pies, Inc.
Red Wing Industries, Inc.
Renown, Inc.
Rollins Container, Inc.
Rossville Packing Co., Inc.
S & P Company
Salsburg Meats, Inc.
Sambo's Restaurants, Inc.
Seneca Industries, Inc.
Shell-Tex Fisheries, Ltd.
Sky View Cooling Co.
Snyder-Craft Co., Inc.
Speas Co.
Steak and Ale Restaurants of America
Sunmark, Inc.
Tierra Royal Potteries, Inc.
Town House Furniture Ltd.
Trappe Frozen Foods Corp.
United Farmers Cooperative, Inc.
United Food Services, Inc.
United Foods, Inc.
Universal Cooperatives, Inc.
Valley Avocado Sales, Inc.
Valley Farms, Inc.
Valley Plastics, Inc.

Walters Brewing Company
West Publishing Co.
Westside Paper Co.
Williams Manufacturing Co.
Winona Industries
Winter Garden, Inc.
Wittek Golf Supply Co., Inc.

Defendants:

Alton Box Board Company
Boise Cascade Corporation
Champion International, Inc.
The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation of America
Container Corporation of America
Crown Zellerbach Corporation
The Continental Group, Inc.
Corco, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Fibre Box Association
Fibreboard Corporation
Green Bay Packaging, Inc.
Hoerner Waldorf Corporation
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
The Mead Corporation
Menasha Corporation
Olinkraft, Inc.
Owens-Illinois, Inc.
Packaging Corporation of America
Potlatch Corporation

St. Joe Paper Company
St. Regis Paper Company
Southwest Forest Industries, Inc.
Stone Container Corporation
Union Camp Corporation
U. S. Corrugated Fibre-Box Company
Western Kraft East, Inc.
Westvaco Corporation
Weyerhaeuser Company
Wilamette Industries

Appearing Class Members:

CFS Continental, Inc.
Harold Freund Baking Co.
Harold Freund Baking Co. of San Jose
Harold Freund Baking Co. of Florida
Harold Freund Baking Co. of Hawaii, Inc.
Barg & Foster, Inc.
Melster Candies, Inc.
Allied Van Lines, Inc.
West Coast Farms, Inc.
Sierra Meat & Produce Co., Inc.
Moyer Chemical Co.
A. J. P. Food Products Co.
D. O. B. Food Products Co.

Absent Class and Subclass Members:

All persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendants, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978.

Cited 1980-1 Trade Cases [77,785]

Corrugated Container

[¶ 63,163] In re Corrugated Container Antitrust Litigation (This document relates to all actions except Civil Actions H-79-87, H-78-2004, H-78-1226, H-78-6718, H-78-1263, H-78-1452, H-78-376, H-78-1815, H-77-2158, H-78-4, H-79-1044, H-79-1086).

U. S. District Court, Southern District of Texas, Houston Division. M. D. L. No. 310. Filed December 21, 1979.

Sherman Act

Class Action—Settlements—Approval of Settlements—Objections—Distribution Plan—Corrugated Container Industry.—Settlements in the massive antitrust litigation concerning the corrugated container industry were approved as fair, reasonable and adequate over objections of class members, settling and non-settling defendants. Objections by class members included issues of conflicting of interests between container purchasers and sheet plants, class representation by attorneys, class members' release of state and federal claims and defective class notice. Objections by settling defendants related to issues of contribution among joint antitrust defendants and the barring of any future state actions. Non-settling defendants wanted (1) the settling defendants' market shares removed from the claims remaining against them, (2) an opportunity for class members to opt into the settlements but out of the continuing litigation against them, and (3) to prohibit plaintiffs from implementing the "most favored nations" clauses of the settlements. A distribution plan was also approved over objections. See ¶ 9032.80.

Order

SINGLETON, D. J.: Before the court is class plaintiffs' motion for final approval of settlements with twenty-seven defendants[1] in this massive antitrust litigation, in which members of the corrugated industry are alleged to have fixed prices in violation of the Sherman and Clayton Acts. These cases were consolidated in this court for pretrial purposes pursuant to 28 U. S. C. § 1407 in late 1977.

On January 1978 a grand jury sitting in Houston returned indictments against fourteen of the thirty-seven defendants in MDL-310, as well as twenty-six employees of corrugated manufacturers.[2] All but two of the corporations and eight of the individuals indicted entered pleas of nolo contendere and were convicted and sentenced on those pleas. The indictment against one individual was dismissed. The two remaining corporations, Mead and Continental Group, went to trial along with seven individuals; all were acquitted in April 1979.

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[1] The settling defendants are: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, McMillan Bloedel (including MacMillan Bloedel Containers, McMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. Non-settling defendants remaining in the class action case are: Alton Box Board Co., Crown-Zellerbach Corp., Fibreboard Corp., The Fibre Box Assn., Georgia Pacific Corp., Mead Corp., Packaging Corp. of America, Potlatch Corp., Westvaco Corp.; Southwest Forest Industries has reached a settlement agreement which has not yet been submitted to the class.

[2] *U. S. v. International Paper, et al,* H-78-11 and *U. S. v. Boise Cascade, et al,* H-78-12.

During the pendency of the government's case, the court first certified a class of direct purchasers in MDL-310 (September, 1978) and then two subclasses; one of container purchasers and one of sheet plants[3] (December, 1978). Discovery was limited during the pendency of the trial of those indicted but was allowed as to grand jury documents and class certification issues.

Two settlements in this case were reached before class certification, with St. Regis and International Paper, on behalf of the whole class, and for a total of $10 million. Nine more were reached, with Union Camp, Boise Cascade, Chesapeake Corporation of Virginia, Diamond International, Longview Fibre, Dura Containers, Champion International (including Hoerner Waldorf), Menasha Corporation, and Willamette, Western Kraft, and Corco, on behalf of the then undivided class, for a total of $68,513,250. These eleven settlements are the "pre-January 5" group which will be referred to throughout this memorandum. Following certifica- [77,786] tion of the sheet plant subclass, the container purchaser subclass negotiated eleven settlements, with Container Corporation of America, Continental Group, Green Bay Packaging, Inland Container, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging Ltd., and MacMillan Bloedel Limited), Olinkraft, Owens-Illinois, St. Joe Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, and Weyerhaeuser Company, for a total of $219,530,000. These settlements allocated a possible $14,896,245 to the sheet plant subclass should it desire to participate; it has now applied for an allocation of $11,000,000,

[3] A sheet plant is a person other than a defendant in MDL-310 or their subsidiaries or affiliates, who purchased corrugated sheets, did not itself manufacture corrugated sheets, and did manufacture and sell corrugated containers and/or fillers, pads, and partitions for use in or with corrugated containers. Any class member who is not a sheet plant is in the other subclass.

which the court has granted. Finally, two "hardship" settlements were negotiated on behalf of the whole class with Consolidated Packaging Corporation and Interstate Container Corporation, for a total of $580,000. With the exception of the last two "hardship" cases, none of the settlements proposed for final approval were negotiated after the beginning of the trial of those indicted. A description of the negotiations has been filed with the court and carefully studied by it.

After the trial of those indicted, notice was mailed to the class, including notice of the proposed settlements. Of the approximately 200,000 members to whom notice was mailed, 210 opted out. Various objections to the settlements were filed, which will be discussed in greater detail below. A pretrial conference was held on December 3 and 4, 1979, to allow a full hearing as to the adequacy and fairness of the settlements. The proponents had filed extensive documentary support and chose not to present further evidence. The objectors were invited to present their arguments and such testimony as they desired; some of them engaged in cross-examination of one of the economic experts whose affidavits had been filed in support of the settlements, and of two attorneys representing sheet plant subclass representatives. This full development of the record has been of great assistance to the court in its determination of the issues presented.

The Proponents' Case

In support of the settlement, proponents have presented the affidavit of an economic expert, Richard C. Hoyt, which indicates that the overcharge by settling defendants to plaintiffs' class was between about two and eight hundred million dollars. This estimate was based on a before-and-after model, using the four years within the statute of limitations as "before" and the years 1977 and 1978, after the grand jury investigation was underway, as "after." The estimate was based on net profits to the settling defendants.

In addition to this economic justification, proponents made the following points in favor of approval: (1) these are partial settlements only, and non-settling defendants remain potentially liable for full damages, less the amount actually paid; (2) the settlements are for a record-making $300 million; (3) they provide for discovery assistance from the settling defendants; (4) they insulate the class from the possibilities of failure of proof at trial, *Illinois Brick* legislation, class decertification, and other potentially harmful events; (5) the settlements are supported by the vast majority of class members and counsel; (6) the settlements (except the "hardship" cases) were negotiated before the acquittals in the trial of those indicted and probably could not be renegotiated at such high figures. Except for Professor Hoyt's conclusions from the economic data, none of the factors favoring approval of the settlements is contested.

The settlement negotiations have been laid before the court in considerable detail and make it clear that they were conducted with authority and at arm's length. The court has previously so found, in preliminarily approving these settlements.[4]

The burden of establishing the fairness, adequacy, and reasonableness is on proponents. [77,787] *Grunin v. International House of Pancakes* [1975-1 TRADE CASES ¶ 60,222], 513 F. 2d 114 (8th Cir.), cert. denied, 423 U. S. 864 (1975).

The Objections of Class Members
[*Conflict of Interests*]

Several objections were filed by class members. Two members of the Plaintiffs' Steering Committee, one of them

[4] Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements (May 30, 1979).

representing a class representative,[5] object that there was a conflict of interest inherent in negotiating for container purchasers and sheet plants prior to certification of the subclasses and in negotiating for a sum that may be allocated to sheet plants after that certification. This objection was raised and extensively briefed before this court granted preliminary approval to the settlements, and at that time the court specifically found that there was no conflict as to either the pre-or post-January 5, settlements.[6] Messrs. Specks and Sloan, the attorneys raising the objection, requested an opportunity to cross-examine the three experts who prepared proponents' economic documentation and Messrs. Montague, Hayes, and Susman (the former two being attorneys for two of the sheet plant subclass representatives and the latter the chairman of the Plaintiffs' Steering Committee). This opportunity was afforded to them. All these persons were available and willing to testify. Three of them were called: Professor Hoyt and Messrs. Hayes and Montague.

The testimony of Mr. Montague as to the conflict question was as follows: He originally represented three plaintiffs, two of them container purchasers and one a sheet plant which had gone out of business in the early seventies. He did not participate in the settlement negotiations with St. Regis or International Paper, but after class certification and the naming of his sheet plant client as a class representative[7] he functioned

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[5] The class representative client of the other Steering Committee member supports the settlements. Seven other named plaintiffs' attorneys also signed this objection, and it was separately raised by one absent class member.

[6] Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements, pp. 4-6 (May 30, 1979). The issue was raised at that time by one sheet plant representative, Great Northern Packaging. Great Northern did not file any timely objection to the final approval, but announced at the hearing that it wished to maintain its previous opposition.

[7] At that time, his sheet plant client Atlas Container was the only

(Footnote continued on following page)

as a member of the plaintiffs' Ad Hoc Settlement Committee and participated actively in or was kept informed by phone of all other pre-January 5 settlements. After the motion of Great Northern Packaging for clarification of the class definition or for creation of a separate sheet plant class, he ceased representation of his container purchaser clients. Atlas and Great Northern were named as representatives of the sheet plant subclass in December, 1978. At the urging of Great Northern's attorney, Mr. Hartunian, he agreed that the sheet plants should not participate in any further settlement negotiations until Mr. Hartunian had had a chance to develop data on any possible differences in damages between sheet plants and container purchasers. He further testified that Mr. Hartunian had not ever developed such data and that his, Mr. Montague's, only study as to possibly different measures of damages for the sheet plants was the evidence presented in the trial of those indicted.

Mr. Hayes testified that he represented Rollins Container in a tag-along action transferred to this court, that his client is a sheet plant and buys about one million dollars' worth of sheets and containers per year. He may have spoken with Messrs. Opperman and Susman (members of Plaintiffs' Steering Committee) before filing his suit and certainly did thereafter. He did not apply for Rollins to become a subclass representative; the court asked whether Rollins would be willing to serve in that capacity and after some doubts Rollins consented. He had not made a study as to a possibly different measure of damages for sheet plants but he had discussed the question with Professor Hoyt and knew the ranges of divisions of sales of sheets and containers for the settling defendants. In his opinion and that of his client, damages where only part of the issue as to the

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(Footnote continued from preceding page)

named plaintiff sheet plant in MDL-310. Subsequently, a tag-along filed by two sheet plants, Great Northern Packaging and Huron Packaging was transferred to this court by the Panel on Multidistrict Litigation.

fairness of the settlements. In response to a question by the court, he stated that he had always considered injunctive relief very important and had so stated to the court during a pretrial conference.[8]

Professor Hoyt's testimony relative to the conflict question was as follows: The net profit figures of settling defendants were not broken down as to sheets and containers, and he made no attempt to [77,788] separate them. He did not prepare a separate study as to sheet plant damages.

This question of a possible conflict of interest was raised in connection with the preliminary approval of these settlements, and at that time the court determined that no such conflict existed, for the following reasons: First, no inherent conflict has been shown between sheet plants and container purchasers. The decision to carve out a sheet plant subclass was made out of an abundance of caution, not because an inherent conflict had been demonstrated. There are undeniably some differences between sheet plants and container purchasers: sheet plants compete with the defendants in box sales, may themselves have participated in the alleged price-fixing conspiracy, desire injunctive relief as well as damages, and may have a somewhat different measure of damages.[9] The evidence before the court so far however, would indicate that somewhat different interests and problems may exist for many subgroups—large purchasers versus small purchasers, pre-versus post-statute of limitations purchasers, West Coast purchasers versus those in other parts of the country, purchasers residing in

[8] The application of the sheet plant subclass representative for participation in the post-January 5 settlement funds was made only after a consent decree was negotiated with those settling defendants on behalf of the sheet plant subclass.

[9] Whether the measure would be greater or smaller is unclear. Evidence presented in the trial of those indicted could support an argument that sheet plants are entitled to less than other purchasers or even, at the extreme, to no recovery at all.

states whose state laws afford differing measures of relief, purchasers from indicted versus unindicted defendants, and so on. It is not practicable to manage a case subclassed as to all such internal distinctions, and Rule 23 does not require it.[10] Further, all but the first pre-January 5 settlements were participated in by Mr. Montague, representing a sheet plant and designated class representative. There has been no suggestion that the negotiations were not conducted in good faith and at arm's length. The fact that the court ultimately certified a subclass does not, in and of itself, establish that an inherent conflict ever did exist which would vitiate settlements previously negotiated with full authority and in good faith.

The additional evidence adduced from testimony at the settlement hearing underscores the absence of any conflict. Sheet plants have been represented by a sheet plant at all but the initial stages of the settlement negotiations. Their representation has been enlarged and separated from that of the rest of the class as the development of the litigation has afforded the opportunity and the indications for such additional representation. It is nevertheless clear to the court that, except for the negotiation of injunctive relief, additional representation has not added substantive benefits to the subclass. The objectors

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[10] Even if a potential conflict exists, so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes. Wright & Miller, *Federal Practice and Procedure; Civil* § 1768 and cases cited therein at n. 7 and 8. The practice of negotiating a settlement on behalf of one large class which will later be subclassed for distribution purposes is not uncommon. e.g., *State of West Virginia v. Chas. Pfizer & Co.* [1971 TRADE CASES ¶ 73,540], 440 F. 2d 1079 (2d Cir.), cert. denied, 404 U. S. 871 (1971). Although there have been some assertions that damages are greater than proponents' expert estimates, no one has asserted that more money could have been or could now be obtained from the defendants, or that getting a maximum total fund was not the only motivating factor behind plaintiffs' negotiations on behalf of the entire class.

point out that damages for sheet plants may be different than those for container purchasers, and that no study has been made to determine whether there is such a difference. Neither the objecting sheet plant representative, nor its experts, nor the other sheet plant representatives made such a study, however. This is not surprising, since the objecting sheet plant's experts agreed with the testimony of proponents' expert that data upon which such a study could be based is unavailable.[11]

The fact is that the funds were acquired pursuant to the entirely common goal of achieving the highest amount possible, and by the time any potential conflict could arise as to division of that fund the sheet plants were separately represented. It is noteworthy that the plan of distribution as to the "hardship" settlements (which no one opposes) is the same as that for the pre-January 5 settlements: sheet plants and container purchasers share on the same basis. Further, the sheet plant allocation from the post-January 5 settlements is based on the fundamental proposition, that all purchasers recover on an equal basis. (The distribution plan is discussed in detail below.)

In sum, as to this alleged conflict, the court can find no sign of prejudice to the sheet plants, or to the rest of the class, either in the negotiations on behalf of the entire class or in the provisions after January [77,789] 5 for possible allocation to the sheet plant subclass. Nor can it find impropriety or even a superficial appearance of impropriety.

[*Representation by Attorneys*]

The same objections also raised questions about several aspects of Mr. Susman's performance of his duties as attorney

[11] Report of Drs. John Allen and Roy Gilbert; quantity purchased unknown, p. 2: price index unavailable, p. 4; and affidavit of Dr. Allen.

for a class representative and as chairman of the Plaintiffs' Steering Committee. Mr. Susman filed an affidavit in response which has apparently answered these questions satisfactorily, since objectors did not attempt to controvert the affidavit or even to examine Mr. Susman for further information. The court, too, is satisfied with Mr. Susman's affidavit.

The court is entrusted with a heavy responsibility in a class action and has accordingly explored this issue at greater length than perhaps it deserves. It is a matter frequently of record in this case that an internal struggle within the Plaintiffs' Steering Committee has caused ill will, hard words, dissension and strife. The attorneys now raising this objection approved the first two settlement agreements. One of them sought certification of the identical large class, with his client (a container purchaser) as class representative. None of the objecting plaintiffs, whose attorneys have been members of Plaintiffs' Steering Committee since its inception, have ever moved this court to provide separate representation for the sheet plants.[12] Inasmuch as internecine conflict among class members may bring to light flaws in the class representation, the court and the class may profit by it; but where in fact the only conflict of interest is a conflict of attorneys' interests, the court also has a duty to ensure that class members do not suffer. To disapprove these settlements on this illusory claim of conflict would work a serious disservice to the class.

[*Release of State and Federal Claims*]

Another set of objections and related motions have been filed by certain class members, purportedly on behalf of South Carolina corrugated purchasers, and based upon the requirement of the settlements that a class member release state as well

[12] The Steering Committee's position on Great Northern's motion to establish a sheet plant subclass was that there was no necessity for it but they did not oppose it. No one at that time dissented from or added to that position.

as federal claims. The state antitrust laws of South Carolina, though based on the Sherman and Clayton Acts, provide for a greater measure of damages. Objectors argue from the fact that the state claims were not pleaded and that an action is now pending in state court in South Carolina that this court lacks jurisdiction to approve a final settlement releasing state claims arising out of the alleged conspiracy which is the subject of this suit. The case law is to the contrary. Such releases are reasonable and customary, and without them settlement of large antitrust actions would not be desirable to defendants. *McDonald v. Chicago Milwaukee Corp.*, 565 F. 2d 416, 435 (7th Cir. 1977); *Richard's Lumber Supply Co. v. U. S. Gypsum Co.* [1976-2 TRADE CASES ¶ 61,135], 545 F. 2d 18, 20-21 (7th Cir. 1976), cert. denied, 430 U. S. 915 (1977); *Abramson v. Pennwood Investment Corp.*, 392 F. 2d 759 (2d Cir. 1968). The South Carolina objectors further argue that class notice was defective in that it did not describe the state antitrust laws and did not contain the full text of the settlement agreements. It is clear that this sort of detail is unnecessary and even undesirable in class notice. *Grunin v. International House of Pancakes* [1975-1 TRADE CASES ¶ 60,222], 513 F. 2d 114, 122 (8th Cir. 1975); *Gold Strike Stamp Co. v. Christensen* [1971] TRADE CASES ¶ 73,436], 436 F. 2d 791, 798-99 (10th Cir. 1970). The notice, which included a release, makes plain that state claims will be released by class members. Objectors next request that they be allowed to retain their state claims while remaining in the class as to the federal claims and the settlements. There is no option under Rule 23 to participate in the class and the desirable aspects thereof, such as settlement funds, and opt out as to the undesirable aspects, such as release of claims. *Muldrow v. H. K. Porter Co.*, 20 Fed. Rules Serv. 2d 1069 (N. D. Ala. 1975). Of course, anyone who wishes to pursue his claim under state law had the chance to opt out of this class; for those who chose not to do so, the settlements are still fair, reasonable, and adequate. South Carolina case law cited by Judge Chapman in objectors' state case makes it clear that it is very unlikely

any court would hold that plaintiffs have a cause of action under the state laws. *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 TRADE CASES ¶ 62,423 at 76,550 (D. S. C. 1978).

A handful of other objections have been raised by these or other class members. The court has given them all careful consideration, although they are not discussed [77,790] here, and has decided they must be overruled.

The Objections of Defendants
[*Settling Defendants*]

Some of the settling defendants have raised two objections to final approval of their settlements at this time. First, they want to wait until it absolutely clear that this court's ruling, already affirmed by the Fifth Circuit,[13] that contribution is not available among joint antitrust defendants will not be reversed. Second, they want to wait until it is absolutely clear that the class settlement of all state as well as federal claims will bar any state actions against them. Since the court cannot envision that either unlikely eventuality would entitle settling defendants to rescission or modification of their agreements, these objections are overruled. The settlements were negotiated by very able and experienced lawyers, presumably familiar with the state of the law on contribution and state claims, and it is virtually inconceivable that these two contingencies were not factored in by them.

[*Non-settling Defendants*]

Non-settling defendants have raised three objections to approval of the settlements. Their standing to object is questionable. *In re Beef Industry Antitrust Litigation* [1980-1 TRADE CASES ¶ 63,021], (November 26, 603 F. 2d 1367, 1372-

[13] No. 79-2439 (5th Cir., Oct. 30, 1979) (unpublished opinion).

73 (5th Cir. 1979). The court has considered them on the merits, however, for the third time.[14] First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury, and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely. Second, non-settling defendants want class members to be given an opportunity to opt into these settlements but out of the continuing litigation against them. There has been no precedent cited to the court for this novel approach; nor has it been shown that this issue has any bearing on the adequacy, fairness, and reasonableness of these settlements. Third, they wish to prohibit plaintiffs from implementing the "most favored nations" clauses of the settlements. As has been repeatedly pointed out in this litigation, the clauses in question are about as toothless as a "most favored nations" clause can be and do not pose any impediment at all to reasonable settlement negotiations with the defendants remaining in the case.

In deciding whether to approve settlements on behalf of a class, the judge must determine whether they are fair, reasonable, and adequate. The *Manual for Complex Litigation* suggests that the single most important factor to be considered is the strength of the plaintiffs' case in relation to the amount offered in settlement. *Manual* at 56. In this respect, the court must give considerable weight to the fact that the trial of those indicted resulted in acquittal for all defendants, and to the fact that the partial settlements before the court represent a very significant percentage of the total estimated damages to the class.[15] Further factors suggested by the *Manual* are the ability

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[14] These same objections were raised and overruled in connection with preliminary approval and form of notice.

[15] These calculations used single damages, *City of Detroit v. Grinnell Corp.*, 484 F. 2d 448, 458-59 (2d Cir. 1974), and the four

(Footnote continued on following page)

of the defendants to pay (a consideration only applicable to the two "hardship" settlements here); the complexity, length, and expense of further litigation; and the amount of opposition. From the court's extended acquaintance with this litigation, it can say with assurance that continued litigation would be extremely long, complex, and expensive; and that the discovery cooperation clauses will reduce the length and expense to all parties remaining in the case, above and beyond the savings represented by removing the majority of the defendants. As to the settlement opposition, it is noteworthy that far less than one percent of this large class have opted out, and that objections to the settlements were filed by a much smaller number than opted out. The objections have been discussed in detail above, and neither by their number nor by their weight [77,791] do they incline the court to disapprove these settlements. The settlements offer many benefits to the class. They provide a very substantial recovery without giving up any claimed damages that may ultimately be proved. They provide for valuable discovery assistance, and they ensure against the many uncertainties of continuing litigation. They were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive

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year statute of limitations period, *In re Armored Car Antitrust Litigation* [1979-1 TRADE CASES ¶ 62,662], 472 F. Supp. 1357, 1373 (N. D. Ga. 1979); *In Re Anthracite Coal Antitrust Litigation* [1978-2 TRADE CASES ¶ 62,292], 79 F. R. D. 707, 714 (M. D. Pa. 1978). They establish a range of between 170% of actual damages (Professor Hoyt's lowest estimate of damages) to 1.5% (Professor Madansky's estimate of damages, the highest). The court is mindful that a settlement approval hearing is not a trial on the merits, and that the avoidance of necessity for conclusively litigating such questions as the actual damages sustained by the class is one of the main reasons for settlement. *Young v. Katz*, 447 F. 2d 431, 433 (5th Cir. 1971); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). It seems likely that actual damages, if any are found, will be somewhere between these two extremes.

task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations. The law favors settlements, and certainly it should favor these.

The Plan of Distribution

The Plaintiffs' Amended Plan of Allocation and Distribution provides that all claimants share in the pre-January 5 and "hardship" settlements on the following basis: all allowed claims will be totalled and the sum divided into the total fund (after deduction of fees and costs), and the quotient will be multiplied by each claimant's total allowed claim to determine his recovery. As to the post-January 5 settlements, the same procedure would be used except that container purchaser subclass members would claim against the total fund less $11,000,000, and sheet plant subclass members would claim only against the $11,000,000. Allowed claims would be for purchases over the entire eighteen-year period covered by the complaint. There were three objections to this plan. Schlitz and A&P objected only that they had not understood it, and after it had been elucidated they withdrew their objection. One class member objected that the claims period should be for less than eighteen years. To shorten the period would prejudice claimants who purchased for the full period, and a pilot study conducted by Arthur Andersen & Co. indicates that the savings in auditing would not be great enough to justify such a limitation. Finally, a sheet plant claimant objects that it must claim only against the $11,000,000 for the post-January 5 settlements although it purchased both sheets and containers. Sheet plants will recover on all purchases, not only sheet purchases; and the size of the fund has been decided based on the estimated relation between sheet plant purchases and other class member purchases. Of course, any class member's ultimate dollar recovery will depend on how many other claims

are filed against the relevant fund, and this cannot be assessed accurately in advance. The distribution plan appears to be fair and has the support of almost all potential claimants.

Therefore, having reviewed the evidence and arguments presented in support of and opposing the final approval of the settlements in these cases, including briefs, affidavits, economic studies and the testimony of class plaintiffs' economic witness and certain counsel, this court hereby FINDS and ORDERS as follows:

1. Each and every objection to the settlement agreements is overruled. The motions of certain South Carolina class members are denied for the reasons set forth herein.

2. The settlements, which require dismissals with prejudice of state and federal claims as set forth in paragraph 3 below, are fair, reasonable and adequate and therefore finally approved.

3. There being no just reason for delay in entering final judgments, such final judgments are hereby entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, dismissing with prejudice all claims of the Container Purchaser Subclass against Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc.; and all

claims of the Sheet Plant Subclass against Boise Cascade Corporation, The Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Diamond International Corporation, Dura Containers, Inc., Hoerner Waldorf Corporation and Champion International Corporation, International Paper Company, Interstate Container Corporation, Longview Fibre Company, Menasha Corporation, St. Regis Paper Company and Union Camp Corporation, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the alleged unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets as alleged in the Unified and Consolidated Complaint on file herein, provided that the court shall retain jurisdiction over discovery disputes between the settlement class and settling defendants as provided by the settlement agreements.

ADAMS EXTRACT CO., et al.,
Plaintiffs-Appellees,

CFS Continental, Inc., et al., Townhouse Furniture, et al., Rossville Packing Co., et al., Denver Meat Co., et al., Carron Manufacturing Co., Andre-Boudin Bakeries, Inc., Ilikon Corp., Great Northern Packaging Corp., et al., Plaintiffs-Appellants-Appellees,

Pleasure Hours, Inc., et al., London Dry Ltd., et al., Plaintiffs-Objectors-Appellants-Appellees,

v.

The CHESAPEAKE CORPORATION OF VIRGINIA, et al., Stone Container Corp., Defendants-Appellants-Appellees.

United States Court of Appeals,

Fifth Circuit.

April 3, 1981.

The United States District Court for the Southern District of Texas at Houston, John V. Singleton, Jr., Chief Judge, approved settlements in class actions brought under the Clayton Act, and appeal was brought by objectors. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) plaintiff negotiators were not shown to have had conflicts of interest which would render them inadequate representatives of subclasses; (2) lack of presettlement discovery does not alone invalidate settlements; (3) District Court had power to approve settlements releasing defendants from federal and state claims, though state claims were not pending in federal District Court; (4) alleged defects in notice to subclasses did not invalidate settlement; and (5) settlements were properly considered for approval prior to judicial resolution of issue whether nonset-

tling defendant had right to bring contribution action against settling defendants.

Remanded with instructions.

1. Federal Civil Procedure 1699
Federal Courts 753

District court in passing upon proposed class action settlement must determine whether settlement is fair, adequate and reasonable, and appellate function is limited one, especially in light of strong judicial policy favoring settlement of disputes. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

2. Federal Civil Procedure 1699

Even if subclasses had significantly diverging interests so that attorney could not adequately represent all interests throughout litigation, settlements are not necessarily void, but, rather, even irregular settlement negotiations may form basis for judicially acceptable class action settlement if record clearly indicates that representation of class during negotiations was adequate and that settlement itself is fair. Fed. Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

3. Federal Civil Procedure 165

So long as all class members are united in asserting common right, such as achieving maximum possible recovery for class, class interests are not antagonistic for representation purposes. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

4. Federal Civil Procedure 1699

Neither subclass in class action succeeded in showing that asserted inadequacy of settlements resulted from tradeoff of rights of one subclass in order to realize interests of the other. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

5. Federal Civil Procedure 176

Where there was no suggestion that steering committee consciously embarked on course of negotiating discounted settlements with defendants in class actions only if market shares of such defendants were disproportionately large with respect to corrugated sheets as opposed to corrugated containers or that committee attempted to negotiate early, heavily discounted settlements for both such subclasses but confined benefits of later, more valuable settlements to container class, but, rather, settlement with defendant which was nation's third largest manufacturer of corrugated sheets was only first settlement in committee's strategy of demanding successively higher payments for each settlement, no prejudice to sheet subclass from unified representation was shown, particularly where it was believed that all defendants would be jointly and severally liable for all damages. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

6. Federal Civil Procedure 1699

In class action wherein container subclass resumed settlement talks but sheet subclass did not, apparently deciding to seek further economic data first, and defendants were reluctant to settle at substantial dollar amounts for release covering only one subclass, approach of container's subclass to settlement, by negotiating for portion of each settlement to be set aside for sheet plant subclass but only in event sheet plants applied to participate in such particular settlements and whereby if sheet plants decided not to participate entire amount paid by each settling defendant would inure to exclusive benefit of container purchasers was not objectionable on grounds asserted. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

7. Monopolies 25 (1)

On record, discovery requests in anti-trust suit were irrelevant, and district court was acting within its discretion in denying them. Clayton Act, § 4, 15 U.S.C.A. § 15.

8. Federal Civil Procedure 1699

In view of fact that, notwithstanding status of discovery, plaintiffs' negotiators in class action had access to plethora of information regarding facts of their case, formal discovery was not necessary ticket to bargaining table, and even if there was imbalance of information between defendants and plaintiffs, settlements were not necessarily thereby invalidated, but, rather, if terms of settlement were fair, court could reasonably conclude that counsel performed adequately. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

9. Federal Civil Procedure 1699

District court's most important function in reviewing compromises of class actions is its consideration of settlement terms, and if terms themselves are fair, reasonable and adequate, it matters not whether another team of negotiators might have accomplished better settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

10. Federal Civil Procedure 1699

On proposal of settlement in class action case, settlement terms should be compared with likely rewards class would have received following successful trial, and district court must balance strength of case for plaintiffs against amount offered in settlement, and thus district court should first evaluate likelihood that plaintiffs would prevail at trial, then establish range of possible recovery and then establish point on, or if appropriate, below, range of possible recovery at which settlement is fair and adequate. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

11. Federal Civil Procedure 1699

Evaluation of fairness of settlement of class action is not and cannot involve trial on the merits, but district judge must undertake analysis of facts and law relevant to proposed compromise and must support his conclusions by memo-

randum, beyond mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of facts or analysis of the law, and this is so that appellate court will have basis for judging exercise of trial judge's discretion. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

12. Federal Civil Procedure 1699

Where there are objectors to settlement of class action, proponents can be expected to present evidence and arguments suggesting that settlements are within range of reasonableness, and objectors will do same for contrary position, and court can generally fulfill its responsibilities by examining settlements in light of objections raised and by setting forth on the record a reasoned response to objections including findings of fact and conclusions of law necessary to support response. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

13. Federal Civil Procedure 1699

When objectors to class action settlement in price-fixing case seek to include [198] years outside statute of limitations in damage computation period, court should evaluate fraudulent concealment argument problems of proving price-fixing conspiracy for longer period and additional difficulties of proof in assessing damages. Clayton Act, § 4, 15 U.S.C.A. § 15, Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

14. Federal Civil Procedure 1699

Even if offer to settle action for price-fixing was best offer that defendants were willing to make, such fact was not reason to approve otherwise inadequate settlement, and court's comment, that it perceived no challenge to validity, or at least utility, of before-and-after price comparison approach based on excess profits, as a means of estimating damages, was insufficient to explain why such approach was found more accurate than those of objectors' experts, who pegged damages

at substantially higher levels. Clayton Act, § 4, 15 U.S.C.A. §15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

15. Federal Civil Procedure 1699

Use of special master in evaluating settlement in particularly complicated cases was endorsed by Court of Appeals on its questioning whether either district judge or panel of Court of Appeals had sufficient acumen in field of economics to consider, unaided by objective independent expertise, economic issues involved in Clayton Act suits at bar. Clayton Act, § 4, 15 U.S.C.A. §15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

16. Federal Civil Procedure 1699

For purposes of passing upon reasonableness of proposed class action settlement, case in which defendants have been acquitted has less settlement value than one in which convictions have been obtained, and court's inference, from acquittal, that ultimate success was by no means assured was entirely proper. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

17. Federal Courts 701

Even if district court's relationship with civil and criminal antitrust cases might have provided it with knowledge about strength of plaintiffs' civil action, such knowledge did not enable Court of Appeals to review approval of settlement without specific findings, supported by information in record presented to Court of Appeals. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

18. Federal Civil Procedure 1699

Federal district court in deciding if settlements in class action are reasonable in light of necessary determinations is not confined to mechanistic process of comparing settlement to estimated recovery times multiplier derived from likelihood of

prevailing on merits, but should be guided also by other factors, relevancy of which will vary from case to case, including complexity, expense and likely duration of litigation, reaction of class to settlement and stage of proceedings, and, after court identifies such factors and explains their relevance to settlement, court should proceed to explain why it is either approving or disapproving settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

19. Federal Civil Procedure 1699

Virtually all class actions will result in long, complex and expensive trials, and question for district court in passing upon reasonableness of settlement is whether likelihood of especially long and complex trial is enough in particular case to warrant substantial reduction in what class might otherwise receive in settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

20. Federal Civil Procedure 1699

Great support for settlement of class action is factor favoring approval by the court, but low level of vociferous objection is not sufficient to sustain court's approval without explanation. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

21. Federal Civil Procedure 1699

Overall list of findings may be sufficient for review of approval of class action [199] settlement when court has made detailed and careful explanations as it conducted its consideration of each factor affecting its exercise of discretion, but findings alone are not necessarily sufficient.

22. Federal Civil Procedure 1699

Ordinarily, individually negotiated settlement with one of many defendants in class action should be approved or disapproved as individual settlement and not as part of package. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

23. Federal Courts 813

It is not for Court of Appeals on review of district court's approval or disapproval of class action settlement to exercise discretion, but it is for Court of Appeals, rather, to review exercise of discretion by the district court. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

24. Federal Civil Procedure 1699

When there are subclasses in class action, with each subclass independently represented, allocation formula may be negotiated without each subclass undertaking extensive analysis of its relative damages if available evidence is, at time of negotiations, insufficient to indicate need for it. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

25. Federal Civil Procedure 1699

Where at time of negotiations in class action plaintiffs knew that all damages, both to sheet customers and container customers, resulted from common conspiracy, district court could reasonably approve settlement treating sheet and container purchasers in same fashion though sheet plants apparently possessed documents suggesting that overcharge for sheets might have been less than overcharge for containers. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

26. Federal Civil Procedure 1699

If adequacy of class action settlement rests on value of one set of claims, distribution of settlement should be weighed heavily in favor of plaintiffs whose claims comprise that set, though there might be circumstances in which such rule would not apply.

27. Federal Civil Procedure 1699

If district court in approving class action settlement based its estimate of what plaintiffs would recover on value of post-

1972 claims alone, and if district court failed to provide reasoned explanation why substantial portion of settlement money should be distributed to plaintiffs in satisfaction of their pre-1973 claims, distribution formula could not be approved. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

28. Federal Civil Procedure 1699

In view of proper notification to class members, court as part of settlement could release not only those claims alleged in complaint and before court, but also claims which could have been alleged by reason of or in connection with any matter of fact set forth or referred to in complaint, and district court had power to release state claims even though those claims were not pending before it. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

29. Federal Civil Procedure 1699

Releases from state claims, on approval of class action settlement, are generally reasonable, and objectors should point to any extraordinary factors dictating different treatment. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

30. Federal Civil Procedure 1699
Federal Courts 701

Where record on appeal did not indicate whether state-law objectors to proposed settlement in federal district court submitted to latter court copy of state court injunction forbidding state defendants to settle state claims as part of compromise of federal actions, district court had no basis to consider relevance of such injunction to federal court's approval of settlement, which included settlement of state law claims not before federal district court, and neither did Court of Appeals. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

31. States 4.16

Nothing in Tenth Amendment or its accompanying case law mandates judicial [200] reluctance to enter state antitrust area, and Tenth Amendment did not prevent federal district court from approving settlements releasing state claims, which were pending in state court but not in federal court. U.S.C.A.Const. Amend. 10; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

32. Federal Civil Procedure 164

Where plaintiffs having state law claims pending in state court had opportunity to opt out of class and litigate their state claims in state court and, before they were asked to opt out, knew that settlements comprising class members' state claims had been negotiated, but plaintiffs wanted to participate in class, share in fruits of the class' settlement negotiations and still be free to litigate their state claims, state law claimants accepted risk that they would be precluded in federal district court from pursuing state law claims, and state claim claimants could not complain that class counsel was inadequate for making, in effect, release of their state law claims a condition for participation in the class.

33. Federal Civil Procedure 179

Notice to class members was not defective because notice of class action was combined with notice of proposed settlements, nor was any prejudice shown from inclusion of claims form with notice, in view of fact that claims form, on which class members were asked to list their purchases, did not waive any rights to object to settlement. Fed.Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

34. Federal Civil Procedure 1708

Where it was unlikely that smaller class members would have objected to settlement or opted out of class on basis of unit

recovery figures, and where class members with large claims had sophistication to estimate approximate amount they would secure from settlements, district court did not abuse its discretion by approving class action notice without unit recovery figures, though notice would have been better had it included information that some class representatives thought settlements were inadequate. Fed.Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

35. Federal Civil Procedure 1708

District court acted within limits of discretion in approving notice of proposed class action settlements despite contention that notice should have summarized opinions of sheet plant and state-law objectors. Fed.Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

36. Federal Civil Procedure 1699

District court was not required to delay approval of settlements of class action until nonsettling defendant's right of contribution was finally resolved. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

37. Federal Civil Procedure 1699

District court's inherent power to manage class action gives it discretion to decide when to review adequacy of settlement, and court's most important consideration in exercising such discretion is whether proponents are ready to demonstrate that settlement is fair, reasonable and adequate, and, if they are, court should proceed to consider settlement at early date, particularly when approval or disapproval bears on interests of other parties preparing for trial. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

38. Federal Civil Procedure 1699

Reason court is called on to review class action settlement is to protect rights of many absent class members who were not

involved in negotiations leading to settlement, and defendant who negotiates settlement does not need court to act in fiduciary role to protect its interest. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

Aram A. Hartunian, Marshall Patner, Pressman & Hartunian, Chtd., Chicago, Ill., Michael Perrin, Wayne Fisher, Fisher, Rock & Gallagher, Houston, Tex., for Great Northern Packaging Corp.

Granvil I. Specks, Perry Goldberg, Gary L. Specks, Specks & Goldberg, Chicago, Ill., for CFS Continental, Inc. et al.

Michael J. Freed, Joseph A. Ginsberg, Levin, Ginsberg & Novoselsky, Lawrence H. [201] Eiger, Muchy, Shelist, Freed, Denenberg, Ament & Eiger, Chicago, Ill., for Rossville Packaging Co., et al.

R. Clifford Potter, Dennis P. W. Johnson, Bell, Boyd & Lloyd, Chicago, Ill., for Boise Cascade Corp.

James B. Sloan, Michael P. Connelly, Sloan & Connelly, Chicago, Ill., for Ilikon Corp.

Phillip C. Goldstick, Goldstick & Smith, Chicago, Ill., for Wittek Golf Supply Co.

Fletcher H. Etheridge, Houston, Tex., for Alton Box Board Co., et al.

Richard N. Carrell, Houston, Tex., for St. Joe Paper Co.

Bader & Bader, White Plains, N. Y., for London Dry Ltd. and Pleasure Hours, Inc., et al.

Guido Saveri, Saveri & Saveri, San Francisco, Cal., for Andre-Boudin Bakeries, Inc. et al.

Ellis Sostrin, Sostrin & Walner, Chicago, Ill., for Townhouse Furniture et al.

Robert H. Weir, San Jose, Cal., for Denver Meat Co., et al.

Lawrence Walner, Chicago, Ill., Leonard Barrack, Barrack, Rodos & McMahon, Philadelphia, Pa., for Carron Mfg. Co.

W. Donald McSweeney, Thomas P. Luning, Janet M. Koran, Schiff, Hardin & Waite, Chicago, Ill., for Continental Group, Inc.

C. Kenneth Shank, Jr., New York City, for Olinkraft, Inc.

David E. Bennett, Chicago, Ill., for Container Corp. of America.

Thomas G. Slater, Jr., Ray V. Hartwell, III, Douglas W. Kenyon, Richmond, Va., John D. Roady, Houston, Tex., for Chesapeake Corp. of Va.

John D. Roady, Lynda M. Jenkins, Hutcheson & Grundy, Houston, Tex., for Owens-Illinois, Inc.

MacDonald Flinn, New York City, for MacMillan Bloedel, Inc.

David T. Hedges, Jr., Houston, Tex., for Inland Container Corp.

Stephen D. Susman, Susman & McGowan, Houston, Tex., Vance K. Opperman, McGovern, Opperman & Paquin, Minneapolis, Minn., Allen D. Black, Fine, Kaplan and Black, Philadelphia, Pa., Jerry S. Cohen, Kohn, Milstein & Cohen, Washington, D. C., H. Laddie Montague, Jr., Berger & Montague, P.C., Philadelphia, Pa., Charles D. Kipple, Saccomanno, Clegg, Martin & Kipple, Houston, Tex., Kenton C. Granger, Anderson, Granger, Nagels & Lastelic, Overland Park, Kan., Lowell E. Sachnoff, Sachnoff, Schranger, Jones, Weaver & Rubenstein, Ltd., Jack Corinblit, Corinblit, Shapero & Seltzer, Los Angeles, Cal., for Adams Cal., Lawrence J. Hayes, Maun, Green, Hayes, Simon, Aretz and Murray, St. Paul, Minn. for Adams Extract Co., et al.

Henry L. King, Davis, Polk & Wardwell, New York City, for International Paper Co.

William A. Stearns, Milwaukee, Wis., for Menasha Corp.

David Bland, Houston, Tex., for U. S. Corrugated Fibre-Box Co.

Robert J. Malinak, Houston, Tex.; Gottlieb & Schwartz, Chicago, Ill., for Stone Container Corp.

John H. Morrison, Jeffery M. Cross, G. Christian Kronberg, Kirkland & Ellis, Chicago, Ill., for Weyerhaeuser Co.

Thomas P. Hanrahan, Kirkland & Ellis, Chicago, Ill., for Willamette Industries, Inc.

Michael H. King, Alexander R. Domanskis, Eric S. Palles, Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Ill., for Cons. Packaging Corp.

Kael B Kennedy, Arthur W. Hahn, Lee Ann Watson, Katten, Muchin, Gitles, Zavis, Pearl & Galler, Chicago, Ill., for Interstate Container Corp.

Appeals from the United States District Court for the Southern District of Texas.

[202] Before TJOFLAT, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

TJOFLAT, Circuit Judge:

The appellate saga of the Corrugated Container antitrust litigation continues.[1] In this chapter, we consider two district

[1] The district court proceedings have already generated the following decisions: *In Re Corrugated Container Antitrust Litigation*, 606 F.2d 319 (5th Cir. 1979) (appeal dismissed without published opinion); *In Re Corrugated Antitrust Litigation*, 611 F.2d 86 (5th Cir. 1980); *In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir.), *cert. denied*, ____U.S.____, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980); *In Re Corrugated Container Litigation*, 620 F.2d 1086 (5th Cir. 1980).

court orders approving settlements between plaintiff-class representatives and twenty-four of the thirty-seven defendants.[2] The appellants in this appeal include two groups of dissident plaintiffs who argue that the settlements are invalid and must be set aside, and that even if they are valid, the formula by which they are to be distributed must be modified; a third group of plaintiffs who ask us to void those parts of the settlement that prevent them from pursuing state law remedies based on the same operative facts that underlie the settled federal claims; a fourth group of plaintiffs (comprised of one of the first two groups and the third group) who claim the notice informing the class of the settlement was defective; and various defendants who ask that we delay either approval of the settlements or distribution of the settlement proceeds[3] until there is final judicial clarification of the rights of non-settling defendants to bring actions for contribution against the settling defendants.[4] None of these arguments persuades us that the settlements must be set aside or modified; we are, however, in agreement with certain objectors that the district court's findings are insufficiently detailed to allow us to determine whether the district court abused its discretion in concluding that the terms of the settlements, and the plan to distribute the settlement proceeds to class members, are fair, reasonable and adequate.[5] We therefore remand the case to the district court

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[2] Since the district court issued the orders involved in this appeal, twelve more defendants have settled. After this appeal was taken, the remaining defendant proceeded to trial before a jury and was found liable to plaintiffs.

[3] Amounts paid toward the settlement have been deposited in an escrow account pending resolution of this appeal.

[4] These settling defendants claim that in the event they are held liable for contribution, they could rescind the settlement under the doctrine of commercial frustration.

[5] We find the court's findings on matters other than the terms of the settlement adequate. Thus, we are able to affirm the court's rejection of settlement attacks premised upon attorney conflicts of interest or the lack of presettlement discovery.

for more detailed findings explaining its approval of the settlements. We retain jurisdiction during this limited remand.

I

The Facts

We begin with a description of this litigation's general history. In 1976, the government convened a grand jury to investigate possible criminal antitrust violations occurring in the corrugated container industry. Several purchasers of corrugated containers and corrugated sheets subsequently filed treble damages actions against thirty-seven defendants under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). These cases, most of which were class actions, were consolidated in the Southern District of Texas in the fall of 1977. On December 6, 1977, the District Court ordered the formation of a plaintiffs' steering committee consisting of thirteen of the lawyers for plaintiffs in the consolidated actions. The district court order vested the committee with broad authority to control the continuing conduct of plaintiffs' cases; this authority included the power to enter into settlement discussions with interested defendants.

On January 25, 1978, the grand jury returned indictments against fourteen of the defendants. The indictments charged that these defendants (and several individuals who had been employed by the defendants) conspired to fix corrugated container and sheet prices between 1960 and 1974.

In addition to the consolidated antitrust actions described, a group of container purchasers filed a state-law antitrust action in the Court of Common Pleas for Spartanburg County, South Carolina. The defendants in this action were also defendants in the consolidated cases. The state-court plaintiffs in these actions resisted efforts to remove their case to federal court, where it would have been transferred to the Southern District of Texas for consolidation. After successfully resisting removal, the plaintiffs moved the South Carolina court to enjoin the

defendants from entering a set[203]tlement with the federal plaintiffs that released the South Carolina claims. This motion was granted.

In March 1978, plaintiffs in forty of the pending consolidated cases filed a single complaint (in the suit now before us) on behalf of all purchasers of corrugated container and sheet products. Soon thereafter, a motion for certification of a class was filed. The motion had not been ruled upon when, on July 28, 1978, Great Northern Packaging Corporation (Great Northern) and Huron Packaging Corporation (Huron), purchasers of sheets, filed a separate anti-trust class action in the United States District Court for the Southern District of Texas against the defendants named in the unified class action. The plaintiff class in this new suit, however, was definitionally limited to sheet plants, that is, sheet purchasers who fabricate containers from their purchases. According to Great Northern and Huron, container purchasers rather than sheet plants had filed, and were prosecuting, the earlier consolidated actions.

Here we digress to consider the differences between the two purported classes. To do this, we must first look at the corrugated container industry. There are three steps in the manufacture of corrugated containers. In the first step, wood pulp is converted into containerboard. In the second step, the containerboard is confected into corrugated sheets. And, finally, in the third step, the sheets are fabricated into containers. The defendants in this appeal perform all three of these functions; that is, they begin with wood pulp and wind up with corrugated boxes. They are thus fully integrated operations.

The defendants sell their finished corrugated boxes to purchasers ranging from "ma and pa" grocery stores to such multinational corporations as Xerox Corporation. This group of purch[illegible] composes the class denominated as container purchasers.

The defendants also sell corrugated sheets to independent enterprises that fabricate and sell their own containers.[6] These corrugated sheet purchasers comprise the sheet plant class. It should be noted that many container purchasers purchase some sheets, and, similarly, many sheet plants will purchase finished containers.

The various actions that had been consolidated, with one exception[7], had been filed by container purchasers. Most of these actions, however, were class actions, and the class definitions were arguably broad enough to include sheet plants. In any event, the plaintiffs' steering committee that was formed pursuant to the district court's December 6, 1977, order was composed entirely of lawyers for container purchasers.

During the summer of 1978, and prior to class certification, the steering committee entered into settlement discussions with St. Regis Paper Corporation, which had not been indicted in the criminal case. These discussions culminated in St. Regis agreeing to pay $1.7 million, which represented $428,000 for each percentage point of the corrugated container market (market point) controlled by St. Regis, to settle the claims against it. St. Regis also made certain concessions and agreed, orally, to cooperate in plaintiffs' discovery effort.[8] Later that

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[6] The container purchasers who buy from these independent fabricators are different from those that purchase from defendants, although there is some overlap between the two groups.

[7] After the initial consolidation of the various pending actions, and after the formation of the plaintiffs' steering committee, five container purchasers and one sheet plant, Atlas Container Corporation, filed still another federal antitrust suit against the defendants. This case was transferred to the Southern District of Texas to be consolidated with the other cases.

[8] At the time of the settlement, Congress was considering legislation that could have conferred standing on indirect purchasers to pursue price-fixing claims and, concomitantly, to permit defendants to assert a pass-through defense against price fixing claims waged by

(Footnote continued on following page)

[204] summer, plaintiffs concluded a second settlement, with International Paper, which had been indicted in the criminal case. International Paper agreed to pay $8.3 million, which reflected $1 million for each percentage point of the corrugated market controlled by the company.[9]

At the time the steering committee negotiated the aforementioned settlements, it had undertaken no discovery going to the merits of the case. (Such discovery was effectively precluded by restrictions imposed by the district court during the pendency of the criminal prosecution.) The steering committee had available to it certain information, however, which, according to the settlement proponents, was adequate for it to make an informed judgment concerning the value of the claims.[10]

(Footnote continued from preceding page)

direct purchasers. Plaintiffs represented to the district court that St. Regis, in negotiations, sought to obtain the right to rescind the settlement if such legislation was enacted and exposed it to a possibility of double liability. The negotiated settlement, however, provides a right to rescission only if such legislation were to be enacted before December 31, 1978.

A second concession was that St. Regis had no right of rescission in the event the class was not certified or, if certified, later decertified. The settlement was, however, contingent on the court's initial approval of a settlement class of plaintiffs.

[9] The terms of International Paper's settlement were similar to those agreed to by St. Regis. See note 8, *supra*. The discovery concessions, however, were reduced to writing.

[10] In urging the district court to accept the settlements, the steering committee claimed it had had access to the following sources of information:

> (a) The indictments and, in the case of International Paper, the extensive bill of particulars filed recently by the Government in the criminal case.
>
> (b) Documents produced by defendants to the Houston Grand Jury.

(Footnote continued on following page)

On September 6, 1978, after the first two settlements had been concluded, the district court entered an order certifying a single class in the consolidated litigation. Great Northern believed the parameters of the class were imprecisely drawn and, in particular, ambiguous concerning whether sheet plants were included in the class. In response to these concerns, Great Northern, on October 6, 1978, filed a motion to clarify the class definition by excluding sheet plants, or, alternatively, to create a subclass for sheet plants. The court took this motion under advisement. Then, on October 26, 1978, without ruling on Great Northern's motion, the district court designated representatives of the class it had already certified. These class representatives included Atlas Container Corporation, which represented itself as a sheet plant.[11]

The class representatives immediately embarked on an exploration of further settlement possibilities. This led, in December, to settlements with seven additional unindicted

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(Footnote continued from preceding page)

(c) Extensive memoranda and affidavits submitted by defendants in response to plaintiffs' class action motion.

(d) Motions and memoranda filed by defendants in the criminal case.

(e) Statistics of the Fiber Box Association relating to sales of corrugated containers and sheets.

(f) Arthur Andersen reports relating to economic conditions in the corrugated products industry.

(g) The opinion and record in *United States v. Container Corporation of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), and the opinion in *United States v. Consolidated Packaging Corporation*, 575 F.2d 117 (7th Cir. 1978).

Record Excerpts at 276 (footnote omitted).

[11] See note 7, *supra*.

defendants. These settlements ranged from $2 million per market point to $2.75 million. In addition, a misdemeanor indictee settled for $3.5 million per point, and a felony indictee for $4.5 million.

On December 26, 1978, the district court responded to Great Northern's motion by certifying two subclasses, one of container purchasers and the other of sheet plants. The court named Great Northern as one representative of the sheet plant subclass; Atlas Container, which previously had been designated a class representative, was also named a sheet plant representative.[12] With the exception of Atlas Container, the representatives of the container purchaser subclass were the plaintiffs who had been designated on October 26, 1978 to represent the initial unitary class. Also on December 26, the two subclasses declared moratoriums on further negotiations.

The container purchasers lifted their moratorium on January 5, 1979, and throughout [205] the month conducted settlement discussions, but strictly on behalf of their subclass. This created a problem for defendants, who desired settlements that would release them from the claims of both subclasses. This problem was compounded by the container subclass's per-point dollar demands, which were in excess of what the single class had received in the December settlements. Defendants refused to negotiate on these terms, at least without the sheet plants' participation in the discussions.

The sheet plants, however, were unwilling to discuss settlement pending resolution of their investigation into damages suffered by their class. In order to break the resulting deadlock between the container class and defendants, a compromise was reached. The compromise was that a portion of any negotiated settlement would be available to the sheet class

[12] *The attorney for Atlas, who had also been representing five container purchasers, withdrew his representation of the container purchasers.*

if the sheet class applied to participate in it, thus providing the defendants a possibility that the settlement they negotiated would release both subclasses' claims.[13] Eleven settlements, ranging from $1.5 million to $4 million per point, were negotiated on these terms.[14]

Late in January, the two classes negotiated additional settlements with two defendants who claimed an inability to pay large amounts in settlement because of borderline solvency. The plaintiff classes retained two accounting firms to investigate these hardship claims. After the firms reported that the claims were founded in fact, the plaintiffs settled at rates lower than those used in earlier settlements.

The criminal trial immediately followed these settlements, and no further settlements were reached while the trial was in progress. In April, 1979, the jury returned a verdict of not guilty against the defendants who stood trial. (Several of the indicted defendants had previously pleaded *nolo contendere.*)

On April 16, 1979, the plaintiff class representatives filed a motion for preliminary approval of the settlements. Several members of each of the two subclasses opposed the motion. Among the objections were that the settlements were contaminated by conflicts of interest; that the dollar amounts were inadequate; that even if the post-class certification settlements were adequate in amount, the pre-certification settlements with St. Regis and International Paper were clearly inadequate; that

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[13] If the sheet subclass elected not to participate, the container class would receive the entire settlement proceeds, even that portion earmarked for the sheet plants; the sheet plants could proceed to trial.

[14] The sheet plant subclass representatives voted two votes to one to participate in the settlements; after inter-class negotiation, it was agreed that $11 million would be earmarked for sheet plant claims. The sheet plant objectors challenge the sheet plant participation in these settlements in a separate appeal docketed at 80-1476, 80-1521. The briefing on that appeal was not completed until after the issues on this appeal had been briefed and orally argued.

the negotiating attorneys lacked data necessary to evaluate the settlements; and that the objectors were denied the right to explore the settlement negotiations through discovery. By order dated May 30, 1979, the district court rejected these objections as obstacles to preliminary settlement approval, and held that "these settlements are within the range of possible approval and that notice of them should be given to the class members." *In Re Corrugated Container Antitrust Litigation,* 1979-1 Trade Reg.Rep.(CCH) ¶ 62,690 at 77,881 (S.D.Tex. 1979).

The class representatives thereafter sent a single notice to the class members, advising them they were potential members of a class and that settlements with 24 of the defendants had been reached and preliminarily approved by the court. The notice indicated that the total value of the settlements was $300,000,000. Recipients of the notice were given options of participating, of opting out of the class, or of participating in the class but objecting to the settlements. The sheet plant and South Carolina objectors contended that the notice was defective because it omitted relevant information concerning the settlements and because separate notices should have been used to advise the class of the pendency of the [206] actions and of the proposed settlements. In any event, the vast majority of potential class members chose to participate in the class, and only a very small percentage of the class members objected to the settlements.

The court, on December 3 and 4, 1979, presided over a hearing on whether final approval should be given to the settlements. At this hearing, the objections to the settlements raised at the preliminary approval stage were renewed. In addition, new objections were raised. Several defendants objected to approval of the settlements prior to final judicial resolution of the validity of the claims for contribution that certain non-settling defendants had raised against them; other defendants requested that the court approve the settlements, but delay distribution of the proceeds until judicial resolution of

the contribution issue, thus preserving the assets until such time as a right of rescission might arise. The group of plaintiffs that had filed an antitrust action in South Carolina objected to a settlement provision releasing state law claims. Some sheet plants objected to the manner in which the proceeds were to be divided between the subclasses; some container purchasers made similar objections. The district court, nonetheless, approved the settlements and the objectors have brought this appeal.

We discuss these various objections in the following sections of this opinion. Before beginning this discussion we add, parenthetically, that since the district court's approval of these settlements, twelve of the then thirteen non-settling defendants settled their lawsuits. The plaintiffs proceeded against the thirteenth defendant, Mead Corporation, in a jury trial. The jury found that Mead had conspired to fix prices in the corrugated container industry with eighteen of the settling defendants.

II

Arguments that the District Court Abused Its Discretion in Approving These Settlements

Rule 23(e) of the Rules of Civil Procedure requires that a settlement or compromise of a class action be approved by the district court. The district court below, in its 31st pretrial order, found the twenty-four settlements involved in this appeal to be fair, reasonable and adequate and, therefore, approved them. Two groups of plaintiffs, one comprised of certain members of the sheet subclass and the other of members of the container purchaser subclass, contend that the district court's findings and its concomitant approval of the settlements were erroneous. We are, accordingly, asked to set aside the court's approval.

The objecting plaintiff groups, between them, advance three reasons why the district court should not have given these settlements its imprimatur. The first two reasons do not relate directly to the terms of the settlement, but rather to the manner in which those terms were negotiated by the class representatives. Specifically, the objecting plaintiffs contend that the settlements should be set aside because they were negotiated by attorneys who (1) attempted to represent both subclasses as a single client, a representation that, because of the inherent conflicts between the subclasses, could not adequately be undertaken; and (2) lacked sufficient data to evaluate the settlement value of their cases against each of the defendants. We hold that neither of these objections provides grounds for reversing the district court's approval.

The dissident plaintiffs' third objection is to the adequacy of the terms of each of these settlements. The plaintiffs argue that on the record before us, we must find that the district court abused its discretion in holding that the settlements were adequate. We are unable to evaluate this contention, however, because the district court's findings and conclusions on adequacy were insufficiently detailed to inform us of why the court acted as it did. Although we are reluctant to delay further ultimate judgment on these settlements, we are, under these circumstances, compelled to remand to the district court for findings of fact sufficient for us to determine whether [207] its approval of the settlements was a proper exercise of discretion. We will retain jurisdiction of this appeal during the limited remand.

The above-summarized holdings are discussed below.

A.

Standard of Review

[1] Rule 23(e) provides no standard by which a court is to consider the settlement of a class action; rather, the rule states

only that "[a] class action shall not be dismissed or compromised without the approval of the court . . . ." Decisional law, however, provides us with a general measuring rod for considering settlements:

> In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable . . . .

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977). *See also: Young v. Katz*, 447 F.2d 431 (5th Cir. 1971). Approval of a settlement under this standard is not to be upset unless "the trial court clearly abused its discretion." *Young v. Katz, supra* at 432. Thus, our appellate function respecting the various arguments presented on this appeal is a limited one, especially in light of the strong judicial policy favoring settlement of disputes. *United States v. City of Miami, Florida*, 614 F.2d 1322, 1344 (5th Cir. 1980).

B.

Conflict of Interest

We turn to the dissidents' first argument: that the district court should have disapproved these settlements because they were negotiated by attorneys with conflicts of interest that adversely affected their representation of one or both classes. As might be expected, the two classes have somewhat different views on which class was hurt and how the hurt was inflicted. The sheet plant dissidents argue that the pre-January 5, 1979, settlements, covering both classes, were negotiated by attorneys representing container purchasers only, and that those attorneys subordinated the interest of sheet plants to the interests of their clients. The container purchaser dissidents present a more subtle argument. They believe that the attempt to negotiate the pre-January 5 settlements on behalf of both subclasses, with their allegedly diverging and irreconcilable interests, made it impossible for negotiating counsel to "have represented the

interests of both container purchasers and sheet plants adequately in settlement negotiations." Brief of Plaintiff-Appellant Container Purchasers, at 23. Moreover, the dissident container purchasers also challenge the post-January 5 settlements, arguing that the container purchasers' negotiation of a set-aside fund to be allocated among the sheet plants upon their application polluted those settlements with conflicts of interest.[15]

1. *Pre-January 5 Settlements*

[2] We can assume, for purposes of considering the conflicts argument, that the two subclasses had significantly diverging interests and that an attorney could not adequately represent all these interests throughout the litigation.[16] This does not mean that the settlements are necessarily void, however, because even "irregular settlement negotiations may . . . form the ba[208]sis for a judicially acceptable class action settlement . . . if the record clearly indicates that representation of the class *during* the negotiations was adequate and that the settlement itself is fair." *In Re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1131-32 (7th Cir.), *cert. denied,* 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979)

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[15] The sheet plant dissidents do not challenge the post-January 5 settlements on this appeal, but rather do so in related appeals. See note 14, supra.

[16] The district court, however, would dispute this. According to the court,

> The order carving out a separate subclass of sheet plants was entered because there was some suggestion that a conflict could arise between the two groups, and because the court was not at that time familiar enough with the corrugated industry to be sure that such a conflict would not arise. It now appears clear that although differences may exist between the sheets plants and other corrugated purchasers, there are no inherent conflicts between them.

In re Corrugated Container Antitrust Litigation, 1979-1 Trade Reg. Rep. (CCH) 62,690 at 77,882 (S.D.Tex.1979).

(emphasis supplied). The question of fairness of the settlement terms is considered in a separate section of this opinion. We consider, in this section, the question of adequacy of representation.

Recognizing that the allegedly differing interests of the two subclasses might have conflicted at some point in the litigation, we think the question before the district court was whether these interests conflicted at the point of settlement negotiation, and thus deprived either class of the vigorous and unqualified advocacy in settlement negotiations to which both were entitled. In deciding whether the settlements resulted from proper advocacy, we must inquire, first, whether the general interests of the subclasses respecting the settlements were the same and amenable to being achieved by unified representation; and, second, whether any specific features of the settlement sacrificed the interests of one class in favor of the interests of the other.

[3] The way we have framed our first inquiry indicates our agreement with the district court that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *In Re Corrugated Container Antitrust Litigation,* 1980-1 Trade Reg. Rep. (CCH) ¶ 63,163 at 77,788 n.10 (S.D.Tex. 1979). We think it clear that the primary settlement goal of each class was to cause defendants to agree to pay substantial compensation in exchange for the most limited possible release from their obligations and potential liabilities as parties to the litigation.

We have carefully reviewed the objectors' appellate briefs, and their submissions to the district court in opposition to the settlements, and have not been pointed to anything suggesting that other significant subclasses' settlement interests existed.[17]

[17] The district court noted that the only benefit the sheet plants separate representation achieved was injunctive relief.

Neither has there been a suggestion that two sets of negotiators leading to two sets of settlements might have better achieved the common aims of the two subclasses. On the contrary, in these circumstances, logic dictates that one set of negotiators, with the authority to release defendants from *all* claims, would be in a better bargaining position than negotiators with authority to compromise only part of the action.

[4] We next consider whether the negotiators, despite the uniformity of the two subclasses' settlement interests, somehow sacrificed, advertently or inadvertently, the interests of one subclass for those of the other. While objectors from each class argue that the dollar values of the settlements were inadequate, neither class suggests that this inadequacy resulted from a tradeoff of its rights in order to realize the interests of the other class. In fact, the only suggested illustration of potential class conflict evolving into actual prejudice concerns the settlement with St. Regis. The sheet-class objectors contend that this settlement should have been larger because St. Regis, while a small container manufacturer, is the nation's third largest manufacturer of corrugated sheets.[18]

[209] [5] To understand the problem the sheet plant objectors perceive, we must turn to the negotiating history of the settlements. The attorneys who negotiated the settlements believed a favorable psychological climate would be created by offering discounts to early settlors.[19] The earliest settlor was St.

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[18] The sheet plant objectors also allege that the settlement with International Paper illustrates the sacrifice of their interests for those of the container-purchaser subclass. The objectors, however, do not suggest that International Paper was a larger manufacturer of sheets than containers; neither do they offer another explanation of how this particular settlement subordinated their interests to those of the container purchaser subclass. We are therefore unable to perceive a basis for the sheet plant objectors' allegation that the International Paper settlement reflects the container purchaser representatives trading against the sheet plants' rights.

[19] This practice is considered in part D of this section.

Regis, which settled for $428,000 per market point, the market points representing combined sheet and container sales. This was at less than one tenth the rate of the last of the settlements being considered in this appeal. The question here, then, is whether the negotiation of an early and substantially discounted settlement with a defendant whose market share is significant with respect only to sheets is prejudicial to the sheet subclass.

On reflection, we think that it is not. In the first place, the settlement with St. Regis was only the first settlement in the steering committee's strategy of demanding successively higher payments for each settlement. There is no suggestion that the steering committee consciously embarked on a course of negotiating discounted settlements with defendants only if their market shares were disproportionately large with respect to sheets. Neither is there any suggestion that the steering committee attempted to negotiate early, heavily discounted settlements for both subclasses, but confined the benefits of later, more valuable settlements to the container class. Since the sheet subclass is to share in both early and later settlements on the same basis—percentage of all sheet sales to all corrugated sales by all defendants—we do not see how this was inherently unfair to the sheet subclass.

Moreover, at the time these settlements were negotiated, members of both subclasses, objectors and proponents alike, believed that all defendants were jointly and severally liable, *see e. g., Beltz Travel Service, Inc. v. International Air Transport Association*, 620 F.2d 1360, 1367 (9th Cir. 1980); *State of Washington v. American Pipe & Construction Co.*, 280 F.Supp. 802, 804 (S.D. Cal.), *cert. denied*, 393 U.S. 842, 89 S.Ct. 122, 21 L.Ed.2d 113 (1968), and that nonsettling defendants, if ultimately found to be liable at trial, would be responsible for the total galaxy of damages caused by *all* participants in the conspiracy. The only expected reduction in damages would have been for the actual amounts paid in settlement. See Brief

of Class Plaintiffs-Appelees, at 21. This being the expectation, it is difficult to understand how the St. Regis settlement adversely affected the interests of the sheet subclass, since even a defendant with a small sheet market share would be liable for all damages. But even assuming a theory of liability under which non-settling defendants were liable only for their own market shares,[20] the sheet plant subclass would be harmed vis-a-vis the container subclass only if the settling defendants' collective share of the sheet market was larger than their collective share of the container market. By isolating the St. Regis settlement for attack, the dissident sheet plaintiffs seek to ignore this fact.

In short, we hold for the reasons stated that conflicts of interest have not infected the settlement proceedings leading to the pre-January 5 settlements.

2. *Post-January 5 Settlements*

[6] On December 26, 1978, the district court certified the sheet plant subclass. On the same date, and in apparent reaction to the subclass certification, both subclasses declared a moratorium on further negotiations. The container class resumed settlement talks on January 5, 1979; the sheet subclass did not, apparently deciding to seek further economic data first. This divergence in strategies produced a problem for the container class, since defendants were reluctant to settle at substantial dollar amounts for a release covering only one of the subclasses. To induce defendants to consider settlement on this basis, the con[210]tainer purchasers developed a novel approach. A portion of each settlement would be set aside for the sheet plant subclass, but only in the event the sheet plants applied to participate in these particular settlements. If the sheet plants decided not to participate, the entire amount paid

[20] Mead Corporation apparently planned to make this argument at its trial. *In Re Corrugated Container Litigation*, [1980-1] Trade Reg. Rep (CCH) ¶ 63,163 at 77,790.

by each settling defendant would inure to the exclusive benefit of the container purchasers.[21] Moreover, the amount of the set-aside fund was to be a cap on the sheet plant subclass recovery; the sheet plants were to negotiate the actual dollar amount with the representatives of the container purchasers.

In all, eleven settlements were negotiated on this basis. The amount paid by each of these settling defendants was in excess of that paid by defendants who had earlier settled. The container-purchaser subclass contends that the set-aside fund strategem engaged the plaintiff representatives in conflicts that destroyed their ability to negotiate fairly. The sheet plant objectors' argument concerning these settlements is the subject of another appeal;[22] on this appeal, only the container purchaser subclass arguments are before us.

The container class contends that the set-aside fund "is a unilateral unbargained for giveaway of monies properly belonging to container purchasers, and [therefore] further evidence of a conflict of interests and lack of adequate representation in settlement negotiations." See Brief of Plaintiff-Appellant Container Purchasers at 30. The logic of this position eludes us. By the time of these settlements, the container purchasers were grouped into a separate subclass and the negotiators after January 5 were negotiating for the container purchaser subclass only. When faced with the unwillingness of defendants to pay large sums of money to obtain a release from only one of the subclasses, the container purchasers agreed to earmark part of each settlement for *possible* allocation to the sheet plants. The position that defendants would have been willing to pay to the

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[21] There is a suggestion that one defendant had an agreement with the container purchasers that if the sheet plants elected not to participate in the settlement, the set-aside fund could be used toward any settlement with, or to satisfy any judgment in favor of, the sheet plant subclass.

[22] See nn. 14 & 15, *supra*.

container purchasers an amount in excess of the total settlement less the set-aside fund, with no hope of binding the sheet plant subclass, is untenable; it is bereft of logical or factual support.

While it is true that the container-purchaser representatives could have waited until the sheet-plant subclass was ready to participate in negotiations, this would have meant delaying negotiations until after the criminal trial was underway or, more likely, until it had concluded. The container purchasers believed that the eve of trial was an opportune time to bargain, and the only way to bring defendants to the bargaining table appeared to be to offer to create the set-aside fund. Since the container-purchaser objectors do not challenge the wisdom of bargaining on the eve of trial, we see no argument that the decision to negotiate the set-aside fund damaged the container purchasers.

[7] We point out that in finding that the container-purchasers' negotiators adequately represented the container-purchaser interests, we do not pass judgment on the sheet-plant dissidents' objections to the post-January 5 settlements.[23]

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[23] A final note concerning the conflicts of interest argument: The objectors had, two weeks before the preliminary hearing, requested an opportunity to take discovery relating to the manner in which the parties negotiated the settlements. The district court denied these requests because the discovery was not necessary and the request for it was not timely filed. Pretrial Order # 13, Record, vol. 6, at 1068. We are unable to tell from the brief of the objectors whether the district court's refusal to permit discovery is an issue on appeal. Neither the sheet plants nor the container purchaser dissidents identify it in their briefs as such an issue. Given our holding that joint sheet plant-container purchaser representation in the settlement-negotiation stage of this litigation did not create a conflict of interest, and since the objectors have never suggested that discovery was necessary to uncover instances of specific wrongdoing (aside from the general conflicts allegation), the discovery requests were irrelevant, and the court was acting within its discretion in denying them. See *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1218 n.76 (5th Cir. 1978), *cert. denied* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979).

[211] C.

Lack of Discovery

[8] The dissident sheet plant plaintiffs next contend that the settlement should be disapproved because they were negotiated prior to probing discovery. Plaintiffs' theory appears to be that representation in the settlement process is necessarily inadequate unless informed by the process of discovery. It is, in effect, argued that without discovery, the class representatives were not in a position of equality with negotiators for the defendants. From this we are aked to conclude that settlements resulting from this putative inequality of knowledge must be, as a matter of law, inadequate. We disagree.

Initially, we note that notwithstanding the status of discovery, plaintiffs' negotiators had access to a plethora of information regarding the facts of their case.[24] In *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977), a case in which settlement was reached despite only slight formal discovery, we said the following:

> It is true that very little *formal* discovery was conducted and that there is no voluminous record in the case. However, the lack of such does not compel the conclusion that insufficient discovery was conducted.
>
> At the outset, we consider this an appropriate occasion to express our concern over the common belief held by many litigators that a great amount of formal discovery must be conducted in every case.

Thus, we are not compelled to hold that formal discovery was a necessary ticket to the bargaining table. Because the plaintiffs did have access to information, this case cannot be characterized as an instance of the unscrupulous leading the blind.

Even assuming there was an imbalance of information between the defendants and the plaintiffs at the bargaining

[24] See note 10, *supra*.

table, this would not in itself invalidate the settlements. We think in a case such as this, the trial court may legitimately presume that counsel's judgment "that they had achieved the desired quantum of information necessary to achieve a settlement," *id.* at 1332, is reliable. Of course, if tee record points unmistakably toward the conclusion that the settlement was the product of uneducated guesswork, a court *may* be acting within its discretion in disapproving the agreement without ever considering whether the agreement's terms are adequate. But since counsel had access to data, that is not our case.

In general, we think a settlement should stand or fall on the adequacy of its terms. In a very real sense, a review of the terms provides a check on counsel's evaluation of the sufficiency of his working knowledge. If the terms are fair, the court may reasonably conclude that counsel did perform adequately.[25] We stress that this is not to say that a district court may approve a settlement whose adequacy is insufficiently documented at the settlement approval hearing. In fact, where it appears that counsel was relying on judgment bolstered by only a small amount of information, the district court should be especially thorough in its review of the fairness and adequacy of the settlement terms.

D.

Adequacy of the Settlement Terms

The first two objections to the settlements were attacks on the adequacy of the lawyers who negotiated the settlement terms. As a matter of theory, these attacks presupposed that a settlement negotiated by inadequate representatives should not

[25] We hasten to add that the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party who was in a conflict position. *See, e. g., Clark v. Lomas & Nettleton Financial Corp.*, 625 F.2d 49 (5th Cir. 1980).

be [212] approved because adequate representatives could have negotiated more favorable terms. The objectors' third contention, however, is that the actual terms of all but the "hardship" settlements-[6] are so inadequate in dollar amount that the district court abused its discretion in approving them. Having disposed of the objectors' first two arguments, we turn to a discussion of whether the settlement terms are fair, adequate and reasonable.

[9] As we have suggested earlier in this opinion, the district court's most important function in reviewing compromises of class actions is its consideration of the settlement terms. See *Cotton v. Hinton*, 559 F.2d at 1330. It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance. But all this, of course, begs the real question, which is how to determine whether the settlement terms are in fact adequate.

[10] Case law provides us with general ground rules: "The settlement terms should be compared with the likely rewards the class would have received following a successful trial." *Cotton v. Hinton*, 559 F.2d at 1330. And: "the strength of the case for plaintiffs [must be] balanced against the amount offered in settlement." *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.) (quoting *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 740 (S.D.N.Y.1970), *cert.*

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[6] The objectors have not challenged the two "hardship" settlements for adequacy. They do, however, object to the formula by which these settlements are to be divided between the two classes. This is discussed in section III, *infra*.

denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 115 (1971). *See also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974). We think this requires a three-step process. First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate.

[11] We note that this type of evaluation is not and cannot involve a trial on the merits. "[T]he very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty." *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Nor could it be achieved if the range of possible recovery had to be charted with precision. But the district court judge must "undertake an analysis of the facts and the law relevant to the proposed compromise," and he must "support his conclusions by memorandum." *Cotton v. Hinton*, 559 F.2d at 1330. "A 'mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law' will not suffice." *Id.* (quoting *Protective Committee v. Anderson*, 390 U.S. 414, 434, 88 S.Ct. 1157, 1168, 20 L.Ed.2d 1 (1968). This is because "[a]n appellate court . . . must have a basis for judging the exercise of the trial judge's discretion." *Id.*

Thus, we begin our analysis by reviewing the district court's opinion to determine whether its approval of the settlements was based on adequate and careful analysis of "the facts of the case in relation to the relevant principles of

applicable law . . ." *Id.* at 1331. Because we conclude that it was not, we must also determine whether, [213] on the record before it, the district court, in the exercise of its discretion, was *compelled* to either approve or disapprove the settlements. After undertaking this review, we conclude that we must remand to the district court to prepare new findings; if necessary, to take new evidence; and if compelled to do so, to reach new conclusions.[27]

[12] We turn to the specific reasons for our decision. As we have already indicated, the district court must establish the range of possible damages that could be recovered at trial, and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether the settlement is pegged at a point in the range that is fair to the plaintiff settlors. In a case such as this, where there are objectors, the court is aided in its task; the proponents can be expected to present evidence and arguments suggesting that the settlements are within "a range of reasonableness" and the objectors will do the same for the contrary position. By weighing the competing evidence and evaluating the legal arguments, we think the court should be able to reach a just conclusion. It is for this reason that the court can generally fulfill its responsibilities by "examin[ing] the settlement[s] in light of the objections raised and [by] set[ting] forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response." *Cotton v. Hinton*, 559 F.2d at 1331.

We will consider, then, each of the objectors' attacks on the settlement, and the court's resolution of them. Our initial

[27] As is discussed in subsection D.4, *infra*, we are, at this juncture, remanding the case to the district court to allow it to explain in more detail the reasons it approved the settlements. If the court is unable to prepare such findings, we will vacate the order to allow the court to consider the issue anew with new evidentiary hearings and with the ability to reach different conclusions.

discussion is broken down into three parts: one on the range of possible recovery, one on the likelihood of prevailing on the merits, and one on the court's exercise of discretion. We then proceed to explain why we think remand is necessary and what we think the court's task on remand is.

1. *Damages*

The plaintiff proponents of the settlement presented the affidavit of an economist, Richard Hoyt, that estimated that damages to the plaintiff class were between two hundred and eight hundred million dollars for the years 1972-1976, the four-year period not barred by the statute of limitations. It seems clear that the court regarded this range of damages as the benchmark of possible recovery at trial.[28]

At the settlement hearing, and on this appeal, the objectors attacked Hoyt's conclusions on two grounds. First the sheet plant objectors contended that the period he selected to estimate damages should have been enlarged to reflect the entire period of overcharge since plaintiffs might have been able to establish that the defendants engaged in a pattern of fraudulent concealment, which would have tolled the statute of limitations. *See In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, ____ U.S. ____, 101 S.Ct. 280, 66 L.Ed.2d 137 (1980); *Westinghouse Electric Corp. v. Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965); *Rinzler v.*

[28] The settlement proponents would dispute this. In their briefs, the proponents point to footnote 15, appearing in the district court's memorandum approving the settlements, which purports to find that if plaintiffs prevail at trial, "actual damages, if any are found, will be somewhere between [the proponents' lowest estimate ($700,000,000) and the objectors' highest estimate ($1.6 billion) of the damages for the four-year period]." *In Re Corrugated Container Antitrust Litigation*, [1980-1] Trade Reg.Rep. (CCH) ¶ 63,163 at 77,790 n.15. We cannot accept this recital of the self-evident as a finding of fact supporting approval of the settlements or somehow excusing the court from considering the validity of the competing estimates.

Westinghouse Electric Corp., 333 F.2d 719 (5th Cir. 1964). Second, objectors from both the sheet-plant and container-purchaser subclasses, through affidavits of *their* economists, argued that Hoyt's methodology was defective and resulted in an esti[214]mate of damages that was far too low. The objectors urged the district court to accept their own estimates, which were substantially greater than Hoyt's, as providing an accurate range of possible recovery.

We consider first the argument that the court should have considered damages suffered in years prior to 1973. The proponents of the settlements argue that some courts have looked only to years within the statute of limitations to determine whether a settlement is reasonable. *See, e.g., Detroit v. Grinnell Corp.*, 495 F.2d 448, 460 (2d Cir. 1974); *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 714 (M.D.Pa. 1978), *modified sub nom. Colonial Fuel Co. v. Blue Coal Corp.*, 612 F.2d 571 (3d Cir. 1979). The objectors, however, counter that these courts were not confronted with strong arguments that the statute of limitations was tolled by defendants' fraudulent conduct. They argue that in the case before us, evidence of fraudulent concealment does exist, which means that damages should be measured from 1960, the beginning of the conspiracy.

[13] The sheet-plant objectors are correct that the law does not limit the court to the four-year period within the statute of limitations in setting the range of possible damages recoverable after trial. The *Grinnell* case, relied upon by the proponents, explains that consideration of possibly time-barred years was inappropriate there because fraudulent concealment would not, on the facts alleged, extend the period for claims. *Id.*, 495 F.2d at 461. Further, we have not been referred to any case suggesting that damages should, for settlement discussions, be confined to the statutory period in the face of a strong fraudulent concealment argument. We think that when objectors seek to include years outside the statute of limitations in the

damage computation period, the court should evaluate the fraudulent concealment argument. It should also consider the extra problems of proving a price-fixing conspiracy for the longer period and the additional difficulties of proof in assessing damages. If the court finds the chances of substantial recovery for the added years to be insignificant, it may confine its consideration of damages to the non-time-barred years. If the district court concludes that the plaintiffs have a significant change to recover substantial amounts for years outside the statute of limitations, it should refuse to approve a settlement until it is given some estimate of damages for that period, or at least an acceptable explanation why the estimate for the period within the statute of limitations is a fair measure of damages for both periods.[29]

Here the district court failed to explain why it only considered damages for the years within the statute of limitations. Its decision on this matter is an essential element of its overall decision to approve these settlements, but since the court has not provided us the benefit of its thinking, we are unable to review it.

[14, 15] The objectors' second concern is with the methodology Hoyt employed in estimating damages. The objectors argue that the best means of estimating damages in a price-fixing conspiracy is a before-and-after price comparison. Hoyt rejected this method, however, for several reasons, among

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[29] A troubling point is that apportionment of the settlement fund is to be based on the ratio of each class member's purchase dollars between 1960 and 1976 to the total dollar amount of claims submitted. This means, of course, that claims based outside the statutory period will be treated as equal in value to claims within the period. But if the district court finds the former claims to have only marginal settlement value, they should be worth less when the settlement funds are distributed than the latter claims. This problem is considered in section III, *infra*, which discusses allocation of the settlement proceeds.

them (1) that he would have to rely on industry-wide prices, which he perceived as undesirable because the conspirators comprised only part of the industry; (2) he believed that price information for the period before 1973 would be unavailable. In the place of the before-and-after price comparison, Hoyt believed a methodology based on excess profits. Using this approach, he computed the percentage of defendants' sales receipts that constituted profit for the [215] conspiracy period (1972-1976) and a nonconspiracy period (1977-1978) and then compared the two figures. Hoyt believed that the amount by which the profits for the conspiracy years exceeded the profits for non-conspiracy years constituted an excess profit percentage. This figure, when applied to total sales, closely approximated the actual damages suffered.

The objectors believe this methodology is defective for several reasons, primarily the following two: (1) profits are affected by external facts that vary in impact from year to year; (2) costs during the conspiracy period would be higher since industries engaged in price-fixing are less cost-efficient than they would be during a non-conspiratorial period. The dissident plaintiffs also object to the years compared in Hoyt's model, claiming that the conspiratorial period—1973-1976—was a recessionary period in which profits were low, while the non-conspiratory period—1977-1978—was a period of economic expansion in which profits were high. They also object that Hoyt's profit figures were derived from industry sources, without any significant check on their accuracy. The sheet objectors claim that Hoyt made no attempt to determine if their damages should be measured separately from those of the container purchasers. Finally, both sets of objectors take issue with proponents' assertion that the task of preparing a more traditional model based on prices rather than profits could not have been successfully undertaken.

The district court does not discuss these criticisms of the Hoyt study, nor does it explain why it found the Hoyt conclusions more accurate than those of the objectors' experts, who

pegged damages at substantially higher levels. In fact, the court's only comment on the economic validity of the Hoyt analysis suggests that it perceived no challenge to the validity, or at least the utility, of the analysis.

> Although there have been some assertions that damages are greater than proponents' expert estimates, no one has asserted that more money could have been or could now be obtained from the defendants. . . .

In re Corrugated Container Litigation, [1980-1] Trade Reg.Rep. (CCH) ¶ 63,163 at 77,788 n. 10. Objectors' challenges to the Hoyt analysis are implicitly tied to their belief that they could have negotiated better settlement terms. Even if the court is correct, however, that more money could not have been obtained, there is no reason to approve an otherwise inadequate settlement solely because it was the best offer defendants were willing to make.

Given the importance of the question of potential damages, the district court was compelled to consider the validity of the estimate on which it relied. If the court did find the estimate to be valid, it was bound to explain why. Thus, we must remand on this issue as well.[30]

Finally, we note that the district court, in passing on these settlements, considered them, for the most part, as a single settlement rather than as twenty-four separate agreements. The propriety of doing this is considered in the subsection on the

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[30] We are ultimately required to vacate the settlement approval order, the district court may wish to engage the services of a court-appointed expert to review the soundness of Hoyt's methodology. The Manual For Complex Litigation, section 1.46 recommends use of a special master in evaluating a settlement in particularly complicated cases. 1 Moore's Federal Practice §§ 1.46, 3.40 (2d ed. 1980). We endorse this recommendation. We must question whether the district judge or this panel has sufficient acumen in the field of economics to consider, unaided by objective independent expertise, the economic issues involved in this case.

court's exercise of discretion, but two observations concerning damages are appropriate here. First, because each defendant's liability, if any, would be joint and several, his potential liability is the total amount of damages, less any amounts already paid to the plaintiff class. This means, theoretically, that the plaintiffs could obtain the same amount from each defendant. Accordingly, a single computation of a range of possible recovery suffices for each defendant. The second observation, however, is that in determining [216] the amount of damages *actually,* rather than theoretically, recoverable from a particular defendant, the question of that defendant's financial condition *may* become relevant. Except in the case of the hardship settlements, the district court has not made findings about the extent to which these defendants could afford to pay more than they did. We consider this point, too, in the subsection on the court's exercise of discretion.

2. *Risks of Litigation*

The objectors claim that the court incorrectly evaluated the strength of their case on the merits, overemphasizing the risks of litigaton. The district court stated its findings and conclusions on the risks of litigation in its preliminary approval of the settlement:

> There are many risks for plaintiffs in this litigation; the recent acquittal of all who went to trial in the cases brought by the United States serve [sic] to emphasize some of the problems, and there are others that apply peculiarly to those civil cases, such as class certification problems and the proposed *Illinois Brick* legislation. Plaintiffs' ultimate success is by no means assured.

In re Corrugated Container Antitrust Litigation, [1979-1] Trade Reg.Rep. (CCH) ¶ 62,690 at 77,884.

The objectors contest the court's evaluation of litigation risks for three reasons. First, they claim that the court should not have relied on the criminal acquittals, since the standard of

proof in the criminal trials was greater than it would be in the civil litigation. Second, they argue that the court's findings were insufficiently detailed, and conclusory, amounting to mere boiler-plate. Third, they claim that the court failed to explain its conclusion that the risks of litigation justified a settlement at the $300-million mark on Hoyt's $200-to-800 million range of possibilities.[31]

[16] Turning to the first objection, the dissident plaintiffs argue that "a criminal acquittal has absolutely no tendency to make any contested fact in a subsequent civil proceeding more or less probable," and that "giving 'considerable weight' to the criminal acquittals . . . resulted in a distortion of the settlement equation." Brief for Plaintiff-Appellant Container Purchasers at 58-59. If the objectors are contending that the district court should not have considered the acquittals at all, they are in conflict with the Manual For Complex Litigation, section 1.46, which states that the court should consider success or lack of success in a prior criminal prosecution. 1 *Moore's Federal Practice* § 1.46 n. 100 (2d ed. 1980). The Manual's position is sensible. A court may more safely predict that a civil litigant will prevail on the merits if there has been a successful criminal prosecution in a related matter than it could had there been no criminal trial, or, certainly, had there been an acquittal. This being so, a case in which defendants were acquitted has less settlement value than one in which convictions were obtained. Here the court drew from the acquittal only a single inference: "ultimate success is by no means assured." *In re Corrugated Container Antitrust Litigation*, [1979-1] Trade Reg.Rep. (CCH) ¶ 62,690 at 77,884. This was entirely proper.

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[31] This last objection relates to our evaluation of the court's reasoning in reviewing its exercise of discretion, *i. e.*, its determination that the probability of success and the range of possible recovery in the event of success justify settlement at a particular level. See subsection III D., *infra*.

[17] The objectors' second contention is that the court failed to evaluate the strength of plaintiffs' case on the merits. This simply is not true; as the quotation from the court's preliminary approval suggests, the court noted that the risks of class decertification, of *Illinois Brick* legislation, and the problems of proof suggested by the criminal acquittals combined to deprive the class of guaranteed ultimate success. In noting this, the district court said enough, though it certainly could and probably should have said considerably more. We hope that on the limited remand we order [217] today, the district court will explain more completely how it evaluated the strength of plaintiffs' case on the merits. Particularly, the district court may wish to cite those portions of the record below, and, if applicable, the record of the related criminal proceedings, on which it relied.[32]

One final point must be made. The district court concluded that plaintiffs' ultimate victory on the merits is not assured. This conclusion, however, applies to the plaintiffs' case against all the defendants collectively rather than individually. In all probability, the plaintiffs' case is stronger against some defendants than others. Because the district court treated the settlements in the aggregate, it had no occasion to consider the strength of plaintiffs' case against individual defendants. As we explain in the next section, it may have been necessary for the court to consider, to some extent, the strength of plaintiffs' cases against individual settling defendants.[33]

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[32] Proponents of the settlements have suggested that the district court's familiarity with the records in this case and with the criminal trial are adequate support for the court's approval of the settlements. While the district court's relationship with these cases may have provided it with knowledge about the strength of plaintiffs' civil action, we nonetheless are unable to review the approval without specific findings, supported by information in the record presented to us.

[33] The plaintiff class negotiators did consider the relative strength; they generally demanded higher settlements from indicted defendants than from defendants in the unindicted group.

3. *Exercise of Discretion*

[18] We have outlined a three-step process for a district court to use in determining whether it should approve a settlement's terms as fair, reasonable and adequate. In the first two steps, which we have described above, the court must decide two key issues: the range of possible recovery if plaintiffs prevail on the merits and the likelihood that plaintiffs will, in fact, prevail. In the third step of the process, the court, in its discretion, must decide if the settlements are reasonable in light of these determinations. In doing this, the court is not confined to the mechanistic process of comparing the settlement to the estimated recovery times a multiplier derived from the likelihood of prevailing on the merits. The court should also be guided by other factors, the relevancy of which will vary from case to case. Some of the factors that may be relevant in a particular case are "the complexity, expense and likely duration of the litigation . . . ; the reaction of the class to the settlement; [and] the stage of the proceedings. . . . " *City of Detroit v. Grinnell Corp.*, 495 F.2d at 463 (2d Cir. 1974). After the court identifies these factors and explains their relevance to the settlement, it should proceed to explain why it is either approving or disapproving the settlement.

[19] Here, the district court, in addition to its findings concerning damages and the likelihood of success, identified two factors that it felt bore on the reasonableness of the settlements. The first factor was that the trial would be long, complex and expensive. The court, however, offered little to indicate how this affected the reasonableness of the settlement. While the prospect of a long, complex and expensive trial militates in favor of settlement, virtually all class actions will result in long, complex and expensive trials. The question is whether the likelihood of an especially long and complex trial is enough in a a particular case to warrant a substantial reduction in what the class might otherwise receive in settlement.[34] The

[34] It must be remembered that the settling defendant is also spared the expense of trying the case.

district court, however, said nothing to indicate why the prospect of a long trial had a particular impact on this case.

[20] The district court also found that the number of objectors to the settlement and the number of opt-outs was insignificant; from this it concluded that there was great support for the settlements, which is certainly a factor favoring approval. But further explanation was required, for a low [218] level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases. The Corrugated Container Litigation, however, includes many large corporations who were sufficiently endowed to opt out or object to the settlements if they chose to do so. If the numerically small group of objectors was comprised largely of such corporations, perhaps the court's finding of support was improperly predicated. Based on what the court has told us, however, we cannot say.

[21] Thus, we must conclude that the court's findings on factors other than possible recovery and the likelihood of success were not detailed enough for us to review. In its conclusion, rather than explain why it approved the settlements, the court only recited a list of the findings it had made concerning the settlements.[35] While an overall list of findings

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[35] In *In Re Corrugated Container Antitrust Litigation*, 1980-1 Trade Reg.Rep. (CCH) ¶ 63,163 at 77,791, the court stated:

> The settlements offer many benefits to the class. They provide a very substantial recovery without giving up any claimed damages that may ultimately be proved. They provide for valuable discovery assistance, and they ensure against the many uncertainties of continuing litigation. They were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations. The law favors settlements, and certainly it should favor these.

may be sufficient for review when a court has made detailed and careful explanations as it conducted its consideration of each factor affecting its exercise of discretion, this was not the case here.

[22] One last point must be made. As we indicated earlier, the district court appears to have approved these settlements in the aggregate. Ordinarily, an individually negotiated settlement with one of many defendants in a case should be approved or disapproved as an individual settlement and not as part of a package. The package of settlements the district court approved includes early settlements negotiated at a fraction of the value of later settlements. Settlements early and late may both be reasonable, particularly if the district court finds, as it did, that early settlements were needed to induce other defendants to the bargaining table. But this does not excuse a settlement at an inadequate amount. The district court should have made some findings concerning why each individual settlement was reasonable, or at least explained why it was unnecessary to do so.

4. *Task on Remand*

[23] Because the district judge has failed to support his approval of the settlements by adequate evaluation of the facts and analysis of the law, we lack a basis for reviewing his descretion. *Cotton v. Hinton*, 599 F.2d at 1330. Thus, were we at this juncture to affirm the approval of the settlements, we would not be reviewing the district court's exercise of discretion but, rather, exercising our own discretion on the basis of the record before us. This is not our function, and we therefore must remand to the district court.

The remand is a limited one to allow the court better to explain why it approved the settlements. If the district court, after reviewing this opinion, believes its previous approval of the settlements cannot be justified under the applicable legal principles, it may petition this court to vacate its order approv-

ing the settlements and to remand the case for further proceedings on the settlements, and, if necessary, the merits of plaintiffs' claims.

III

Allocation of the Settlements

The sheet-plant and container-purchaser objectors contend that even if the settlements are fair, reasonable and adequate, the formula by which the pre-January 5, 1979, and the "hardship" settlements are to be distributed is not. The formula is a [219] simple one: each class member will file a claim based on its purchases between 1960 and 1978 and "all allowed claims will be totalled and the sum divided into the total [settlement] fund (after deduction of fees and costs), and the quotient will be multiplied by each claimant's total allowed claim to determine his recovery." *In re Corrugated Container Litigation*, [1980-1] Trade Reg.Rep. (CCH) ¶ 63,163 at 77,791. There are, before us, two specific objections to this formula. First, the sheet-plant and container purchasers argue that neither the court nor the subclass representatives had any economic data to justify equal, dollar-for-dollar treatment of container purchases and corrugated sheet purchases.[36] Second, the sheet-plant objectors contend that claims based on purchases before 1973—the cut-off point under the statute of limitations—should not have been treated on par with claims based on post-1972 purchases. We review each of these contentions below.

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[36] The objectors, of course, have differing views on which subclass would benefit from the revised formula. Container purchasers contend that "Proponents' allocation plan unjustly enriched sheet plants at the expense of container purchasers." Reply Brief for Plaintiff-Appellant Container Purchasers at 21. But sheet plants contend that "Whereas for each expenditures of $110.00 a *Container Purchaser* sustained damage in the amount of *$10.00*, for each expenditure of $110.00 a *Sheet Plant* sustained damage in the amount of $15.71." Affidavit of Sam Peltzman, at p. 13, Appendix Brief of Plaintiffs-Appellants Great Northern Packaging Corporation, *et al.*

1. *Allocation Between the Sheet Plant and Container Purchaser Subclasses.*

The container and sheet-plant subclasses negotiated between themselves the interclass allocation formula which treats sheet and container purchases in the same fashion. The settlement proponents represented that they reached the interclass formula because "[b]oth sides recognized that there was no information available that conclusively demonstrated that the subclasses were injured in different degrees." Brief of Class Plaintiffs-Appellees at 54. Since "[t]here was evidence which indicated that the conspiracy was operative as to both sheets and containers and that both were affected by the conspiracy," *id.* at 54-55, the negotiators agreed that the "share-and-share-alike" allocation plan was fair. The district court accepted the allocation formula, but did not explain why it found it reasonable to treat container and sheet purchases in the same manner.

[24] The objectors claim that it was error for the proponents to negotiate this allocation solution without benefit of an economic analysis of the comparative injuries suffered by each subclass and that it was reversible error for the district court to approve the allocation formula without the benefit of such an analysis. We disagree with the objectors to this extent: when there are subclasses, each independently represented, an allocation formula may be negotiated without each subclass undertaking extensive analysis of its relative damages *if* the available evidence is, at the time of the negotiations, insufficient to indicate a need for it.

Other courts have approved the practice of negotiating a formula for distributing settlement proceeds to subclasses. *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1365 (9th Cir. 1979); *In re Gypsum Cases*, 386 F.Supp. 959, 964-5 (N.D.Cal.1974) *aff'd*, 565 F.2d 1123 (9th Cir. 1977). This practice permits the court to avoid "the almost impossible task of determining the distribution of the settlement fund among the myriad claimants," *Equity Funding Corp.*, 603

F.2d at 1365, and can be desirable if the respective subclass representatives have information sufficient to allow them to formulate a reasonable division.

[25] Although the district court did not make findings on this issue, the record establishes that the subclass representatives in this case acted properly in reaching the allocation formula before completing extensive discovery. It must be remembered that the representatives needed to describe the allocation formula in the class notice. Assuming, as the district court was justified [220] in doing, that it was desirable to present these settlements to the class before lengthy trial preparation began, we cannot say that notice should have been delayed until after discovery was completed and an exhaustive analysis of comparative damages made. At the time of the negotiations, the plaintiffs knew that all damages—sheet and container—resulted from a common conspiracy. The sheet plants apparently possessed documents suggesting that the overcharge for sheets *might* have been less than the overcharge for container. The objectors on this appeal advised their respective classes that they suffered greater damages than the other. Moreover, each class knew the other class was receiving similar until about why its damages were greater. Under these circumstances, the plaintiffs acted acceptably in agreeing to the share-and-share-alike distribution formula when they did. Further, the district court acted within its discretion when it approved the formula.[37]

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[37] Even if the formula were based on unacceptable guesswork, we might, on the facts of this case, affirm the district court's approval of it. If we ultimately vacate the order approving the settlements, the district court may have to consider the impact of the jury verdict rendered in the trial of Mead Corporation in deciding whether to approve the settlements and the allocation formula. The jury found, albeit under instructions to which some container-purchaser plaintiffs took exception, that the overcharges for each subclass were five percent. This means that the ultimate fact-finder, on the basis of the

(Footnote continued on following page)

2. *Treatment of Pre-1973 Claims.*

The sheet-plant objectors contend that if the adequacy of the settlement was dependent on a district court finding that the claims for pre-1973 purchases had no value, the settlement should have been distributed on the basis of claims relating to post-1972 purchases only. Their theory is that the settlement would otherwise satisfy nonvaluable claims based on pre-1973 purchases with dollars negotiated on the basis of viable claims based on post-1972 purchases. Because the district court failed in its memorandum to explain its findings on the adequacy of the settlement, we are unable to say whether it found the pre-1973 claims to be without value or of substantially less value than the post-1972 claims. If approval of the settlement was based on either proposition, the objectors may have a valid point.

[**26**] It is self-evident that if the settlement's adequacy rests on the value of one set of claims, distribution of the settlement should be weighed heavily in favor of plaintiffs whose claims comprise that set. There might be circumstances in which this rule would not apply—for example, if most of the plaintiffs had claims in both periods and the cost of devising and implementing a distribution formula based on realtive claim value would be substantial, the distribution might be spread evenly across the board. The district court, however, has failed to provide persuasive reasons why an even spread is appropriate in this case. The court's sole reply to the objection that the claims period should be shortened was that "[t]o shorten the period would prejudice claimants who purchased for the full period, and a pilot study conducted by Arthur

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fully developed facts of the case, concluded that each class was overcharged by the same percentage. In the face of this finding, the district court, if it were to consider the issue again, might well be abusing its discretion if it were to disapprove the "share-and-share-alike" inter-class allocation agreement.

Anderson & Co. indicates that the savings in auditing would not be great enough to justify such a limitation." *In re Corrugated Container Antitrust Litigation*, [1980-1] Trade Reg.Rep. (CCH) ¶ 63,163, at 77,791. This is not responsive to the substantial issues now raised by the sheet-plant objectors.

[27] If the district court, on remand, explains that it based its estimate of what plaintiffs would recover on the value of the post-1972 claims alone, and if it fails to provide a reasoned explanation why a substantial portion of this money should be distributed to plaintiffs in satisfaction of their pre-1973 claims, the distribution formula cannot be approved, and that part of the order approving the settlement must be vacated. If this occurs, the district court [221] might need to carve out additional subclasses to protect the varying plaintiff interests deriving from the periods in which individual class members made their purchases.[38]

IV

State-Law Objectors

Pleasure Hours, Inc. and London Dry, Ltd. are members of the container-purchaser subclass. They are also the named plaintiffs in a South Carolina antitrust suit against the same defendants and based on the same operative facts as this federal antitrust action. According to Pleasure Hours and London Dry, South Carolina antitrust law equates damages with purchase price rather than overcharge and hence treats prevailing antitrust plaintiffs more favorably than federal law. Because of this alleged feature of South Carolina law, Pleasure Hours and London Dry are concerned with the provisions of the settlements that purport to release defendants from state as well as federal antitrust claims.

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[38] Possible subclasses are a class of plaintiffs all of whose claims are based on pre-1973 purchases; a class of plaintiffs all of whose claims are based on post-1972 purchases; and a third class whose claims are based on purchases during both period.

The state law objectors believe that the court should either modify the settlement to eliminate the state-claim releases or declare the releases unenforceable. If this cannot be done, they claim that the court should disapprove the settlements entirely. The objectors apparently base their position on five arguments, none of which has merit and all of which border on the frivolous.

[28] The objectors first argue that because the district court did not have the state law claims before it[39], it was without power to release those claims by approving a settlement. This is simply a misstatement of applicable legal principles, at least cases such as this one in which class members were notified that their state law claims might be released before they had to decide whether to opt out of the class. The weight of authority establishes that in such a case, a court may release not only those claims alleged in the complaint and before the court, but also claims which "could have been alleged by reason of or in connection with any matter or fact set forth or referred to in" the complaint. *Patterson v. Stovall*, 528 F.2d 108, 110 n.2 (75h Cir. 1976). See also *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 435 (7th Cir. 1977). And it has been held that even when the court does not have power to adjudicate a claim, it may still "approve release of that claim as a condition of settlement of [an] action [before it]." *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968) (shareholder derivative action).[40] Thus, the

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[39] It is undisputed that the federal district court would have had pendent jurisdiction to try the state law claims as a part of the consolidated litigation.

[40] The objectors point to the Seventh Circuit decisions in *In Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir.) *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979), in support of their position. The objectors cite the following statement in the court's opinion: "The trial court, having *declined* jurisdiction over state claims, was without power to extinguish them

(Footnote continued on following page)

court had power to [222] release the state claims even though those claims were not pending before it.

[29] The objectors next contend that the settlements should be disapproved because the court did not consider whether the release of the claims rendered the settlement unreasonable. The district court's memorandum order finally approving the settlements, however, includes the following statement: "Such releases are reasonable and customary, and without them settlement of large antitrust actions would not be desirable. . . ." *In re Corrugated Container Antitrust Litigation*, [1980-1] Trade Reg.Rep. (CCH) ¶ 63,163 at 77,789. We agree with the district court that releases from state claims are generally reasonable and the objectors have not pointed to any extraordinary factors dictating different treatment of the state-claim releases here.

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[in settlement]." 594 F.2d at 1134 (emphasis added). Put into context, this statement does not mean what it might otherwise seem to suggest. In the General Motors case, each class member had the option to opt out of the settlement, even though they had previously let lapse their right to opt out of the class. Although the Seventh Circuit's opinion indicates that class notice included the information that General Motors and class representatives had negotiated a proposed settlement, 594 F.2d at 1116, the opinion does not indicate whether the notice informed class members that this settlement would release their state law claims, and we are unwilling to assume that it did. Given this, we read the opinion to hold that a court can approve a settlement extinguishing state claims not before if the class members have been notified that their participation in the class or the settlement might result in release of their state claims. In the case before us, the class notice provided class members with the information that the court had preliminarily approved settlements releasing federal and state claims. Armed with that knowledge, the objectors opted to participate in the class. Thus, the district court's dismissal of the state claims is consistent with our reading of the General Motors case. We thus have no occasion to decide whether we agree with the Seventh Circuit that a federal court can be jurisdictionally barred in some circumstances from releasing state claims not before it.

[30] A third argument seemingly, but inartfully, advanced by objectors is that the release of the state claims is unenforceable because of a state court injunction forbidding the state defendants to settle the state claims as part of a compromise of the federal action. In other words, the objectors are asking us, on appeal, to honor, indirectly, in these settlement proceedings a state court injunction they did not try to enforce directly in any court. Even were we to assume that the objectors could attack a settlement on the basis of an unenforced injunction either in the district court or on appeal, we would be compelled in this case to rule against them. Presumably, their argument is premised on the notion that the state-court injunctive order is a valid one, for certainly the district court cannot be expected to withhold approval of a settlement on the basis of an unenforceable injunction. In the instant case, the record on appeal does not indicate whether the state-law objectors submitted to the district court a copy of the injunction or whether they even requested a hearing to show that the injunction was enforceable. In these circumstances, the district court had no basis to consider the injunction's relevance to approval of the settlements, and neither do we.

[31] The objectors next contend that the tenth amendment prevents the district court from approving settlements releasing state claims. The following passsage from their brief summarizes this argument:

> Since the primary forum for enforcement is the State Courts federal courts should be reluctant to enter into [state antitrust law] unless the State Courts agree to this. It is not necessary for [the objectors] to cite the numerous decisions of the Supreme Court of the United States expressing the same principle.

Brief for Plaintiff-Appellants Pleasure Hours, Inc., Etc. [sic] at 20. We disagree. Nothing in the tenth amendment or its accompanying case law mandates in every case judicial reluctance to enter the state antitrust area. The objectors' contention is frivolous.

[32] The objectors' fifth and final objection is that counsel for the class, by negotiating settlements releasing state claims, rendered themselves inadequate representatives of that portion of the class with South Carolina claims. We think this is an implausible argument, at least in the circumstances of this case. Plaintiffs had an opportunity to opt out of the class and litigate their state claims in state court; more pertinent, they knew that settlements compromising class members' state claims had been negotiated before they were asked to opt out. Plaintiffs, however, wanted to participate in the class, share in the fruits of the class' settlement negotiations, and still be free to litigate their state claims. In short, the objectors felt entitled to the bird in the hand while pursuing the flock in the bush. *See Richards Lumber & Supply Co. v. United States Gypsum Co.*, 545 F.2d 18 (7th Cir. 1976), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1326, 51 L.Ed.2d 593 (1977). If the objectors felt they could do this, that was their [223] prerogative but in so doing they accepted the risk that they would be precluded. At least in a situation like this—in which the objectors had a pending state class action based on the same facts and theories as the federal class action[41]—objectors cannot complain that class counsel was inadequate for making, in effect, release of their state-law claims a condition for participation in the class.

V

Notice

The sheet plant and state law objectors argue that the notice apprising the class of the settlements was inadequate. Although the objectors do not specify what they believe the consequences of this inadequacy to be, we assume their position is that new notice must be accomplished, and, following such notice, a *de novo* hearing in the district court on whether the

[41] Objectors resisted consolidation of their state action with the federal class action.

settlements finally should be approved. In all, these objectors advance four arguments why the notice was defective. None of these arguments convinces us that the notice was inadequate.

[33] The first argument, advanced by the sheet plants, is that notice of the class action should not have been combined with notice of the settlements. This is because "[t]he practice of presenting class members with the ultimatum either to accept the settlement or get out of the class is contrary to fundamental fairness [and] evades the requirements of 23(c)(2) and 23(e) that there be separate notices, in two stages." This argument is specious. Rule 23 includes no language proscribing combined notice of a class action and a proposed settlement. Since there is no specific proscription, the sheet plant objectors are left only with their contention that the single-notice procedure was unfair. This position is incapable of withstanding analysis.

The sheet plants desire an initial notice of the class action and, then, after potential class members have decided whether to participate in the class, notice that the class representatives have reached settlements with certain defendants. At this point, of course, class members could object to the settlements, but if the district court, despite their objections, approved the settlements, all class members would be bound thereby. It thus seems evident what whether one or two notices are employed, a plaintiff will have three options: (1) he may participate in the class; (2) he may participate in the class, but object to the settlements; or (3) he may opt out of the class. Given this, there is only one difference between the scheme advocated by the sheet plants and that confected by the district court: in the latter scheme, the class member knows of the settlement at the time he must decide whether to opt out. Since we have previously held that "neutral information concerning plaintiffs proposed partial settlement ... should [be] included in the court's initial notice [to the class under Rule 23(c)(2)]," *In Re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1105

(5th Cir. 1977), the district court's scheme was certainly a permissible exercise of discretion.[42]

[34] The remaining arguments relate to whether the notice disclosed sufficient information for individual class members to make informed choices about joining the class and accepting or objecting to the settlement. The first such argument is that the notice failed to provide "an estimated range of unitary recovery (e. g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved," as suggested by the Manual for Complex Litigation, section 1.46. 1 *Moore's Federal Practice* § 1.46 (2d ed. 1980). The second [224] argument is that the notice should have informed the class that members of the sheet plant subclass objected to the settlements, and should have included a summary of their reasons for doing so. Similarly, the state-law objectors contend that the notice should have included space for them to explain the purported advantages to South Carolina plaintiffs of pursuing their state-law claims.

The sheet-plant arguments point out rather disturbing omissions in the notice. The Manual states that ordinarily a notice should provide estimates of unit recovery. Class members in this case might have benefitted from the knowledge that some *class representatives* thought the settlements were inadequate. Our review of the notice, however, is confined to a determination of whether the district court abused its discretion in approving the notice, and it is not clear that it did. The court may have decided that estimates of unit recovery were too unreliable to submit. Moreover, class members with large

[42] The South Carolina objectors claim that another aspect of the notice scheme prejudiced class members: the inclusion of a claims form with the notice. (The class members were asked to list their corrugated purchases on this form.) Completion of the form did not waive any rights to object to the settlement and we fail to see how inclusion of the form with the notice prejudiced any class member in any way.

claims had the sophistication to estimate an approximate amount they would secure from the settlements. It is unlikely that the smaller class members would have objected to the settlement (or opted out of the class) on the basis of unit recovery figures since their claims were small.[43] For these reasons, we do not believe the court abused its discretion by approving a notice without unit recovery figures. And while we think the notice would have been better had it included information that some class representatives thought the settlements inadequate, the failure to require such information was not an abuse of discretion.

VI

Defendants and Contribution

As recounted in the facts, Mead Corporation, the single non-settling defendant in this litigation, claims a right of contribution against the defendants who attempted to purchase their peace with the plaintiff classes. Two groups of defendants think this alleged right to contribution, if ultimately upheld, would entitle them to rescind their settlements under the doctrine of commercial frustration. Both groups of defendants believe this possible right to contribution was, at the time the court was considering final approval of the settlement, an interest the district court was duty-bound to protect. One group contends that the district court should have provided this protection by deferring final consideration of the settlements until the ultimate judicial pronouncement is made on Mead Corporation's right, if any, to contribution. See Brief for Certain Settling Defendants-Appellants (the Continental Group, Inc.) at 2. The second group believes the district court properly placed its final imprimatur on the settlements, but should have delayed distribution of the settlement proceeds

[43] Their interests, it goes without saying, were to be scrupulously protected by the court at the settlement hearings.

until all issues concerning rights of recission were resolved. Brief for Settling Defendants-Appellants Owens-Illinois, Inc., etc. at 8. At this time, we hold only that the district court acted properly in deciding whether to approve the settlements when it did. We do not, in this opinion, reach the question whether the district court should have delayed distribution of the settlement proceeds, since this question will be mooted [225] if the settlements are ultimately disapproved.[44] Our retained jurisdiction will permit us to review the question of distribution when the district court, on limited remand, complies with our request as iterated in Part II, *supra*.

[36, 37] The argument that the district court should have delayed approving these settlements until the non-settling defendant's right of contribution is finally resolved is without merit. The district court's inherent power to manage the class action gives it the discretion to decide when to review the adequacy of a settlement. In exercising this discretion, the court's most important consideration is whether the proponents are ready to demonstrate that the settlement is fair, reasonable and adequate. If they are, the district court should proceed to consider the settlement at an early date, particularly when approval or disapproval bears on the interests of other parties who are preparing for trial. Here, as in other contexts, justice unnecessarily delayed can be justice diminished.

[38] The settling defendants, however, claim that the court could not determine whether the settlements were fair and reasonable as to *them* until the contribution claims were resolved. These defendants misconstrue the court's role in passing on the fairness, adequacy and reasonableness of a settlement. The reason the court is called on to review a settlement is to protect the rights of the many absent class

[44] We consider whether the district court should have considered approving the settlements when it did because a negative answer to this question would require us to vacate the order approving the settlements.

members who were not involved in the negotiations leading to settlement. See *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). A defendant who negotiates a settlement, however, does not need the court to act in a fiduciary role to protect its interest. The law provides other remedies if the settlement is legally objectionable from the defendant's standpoint—for instance, it can seek rescission.

Thus, defendants here, are wrong in claiming that the court abused its discretion in reviewing the settlements for final approval in December, 1979. If the defendants' interests in bringing a rescission action required protection, the court could have delayed distribution of the settlement proceeds. Whether the court had the duty to protect defendants' interests on rescission, and whether failing to exercise that duty was reversible error, is a question we reserve until the district court complies with out limited remand order.

VII

Conclusion

We conclude by summarizing our holdings:

(1) We affirm the district court's holding that the plaintiff negotiators did not have conflicts of interest that rendered them inadequate representatives of the subclasses;

(2) We affirm the district court's holding that the lack of pre-settlement discovery does not in itself invalidate the settlements;

(3) We affirm the district court's holding that it had the power to approve settlements that release defendants from federal *and* state claims;

4) We affirm the district court's approval of the notice to the subclasses;

(5) We affirm the district court's decision to consider the settlements for final approval prior to judicial resolution of

whether the non-settling defendant has a right to bring a contribution action against the settling defendants;

(6) We remand to the district court to enter more detailed findings and conclusions concerning the adequacy of all but the two "hardship settlements";

(7) We remand to the district court to enter more detailed findings and conclusions concerning the reasonableness of the formula by which the settlement proceeds for the pre-January 5, 1979, and the hardship settlements are to be distributed to subclass members;

[226] (8) We reserve judgment on whether the district court should delay distribution of the settlement proceeds until there is judicial resolution of the non-settling defendant's right to bring a contribution action against the settling defendants;

(9) We retain jurisdiction of this appeal pending the district court's compliance with our limited remand.

REMANDED with instructions.

In Re GRAND JURY PROCEEDINGS.

Appeal of Frank WHITEHURST,
Appellant.

No. 81-5109
Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

April 3, 1981.

The United States District Court for the Northern District of Florida, William Stafford, J., adjudicated a witness in civil contempt for failing to testify before a federal grand jury after having been given use immunity. Witness was incarcerated and was denied bail pending his appeal. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) there was no cause for witness to refuse to testify; (2) the witness and his counsel were allowed adequate time to prepare for the contempt hearing; and (3) the appeal was either frivolous or taken for delay and the district court did not err in denying bail pending appeal.

Affirmed.

1. Grand Jury 36.5(1)

When witness refuses to testify before grand jury after having been granted use immunity, witness is entitled to adequate time to prepare for contempt hearing.

2. Witnesses 304(1)

Grant of use immunity eliminated Fifth Amendment as grounds for refusing to testify before grand jury. U.S.C.A. Const. Amend. 5.

3. Grand Jury 36.3(3)

Witness' general assertion of illegal and electronic surveillance could not form basis of refusal to testify before federal grand jury where government attorney had made oral statement categorically denying occurrence of any unlawful act. 18 U.S.C.A. § 3504(a)(1).

4. Constitutional Law 82(6)

Adjudicating witness in civil contempt for failing to testify before federal grand jury after having been given use immunity did not violate his First or Ninth Amendment rights. U.S.C.A.Const. Amends. 1, 9.

5. Grand Jury 36.5(1)

Witness, who had refused to testify before grand jury despite grant of use immunity, was allowed adequate time to prepare for contempt hearing where he had from Wednesday evening to Friday morning to retain and consult with counsel, he consulted for almost three hours with counsel, counsel was present and available during grand jury proceedings, and counsel effectively represented witness at immunity hearing and also at contempt hearing. U.S.C.A.Const. Amend. 6.

6. Grand Jury 36.5(1)

Where grand jury witness, who had refused to testify despite grant of use immunity, had no just cause for refusing to testify, witness and his counsel had adequate time to prepare for contempt hearing, and principles of law involved were well established and were discussed by opposing counsel and district judge in contempt proceeding, appeal of order holding witness in civil contempt was either frivolous or taken for delay and district court did not err in denying witness bail pending appeal.

Clyde M. Taylor, Tallahassee, Fla., for appellant.

[76,691] Cited 1981-1 Trade Cases

Corrugated Container

[¶64,114] In re Corrugated Container Antitrust Litigation.

U. S. District Court, Southern District of Texas, Houston Division. M. D. L. 310. Filed June 4, 1981; amended June 22, 1981.

Sherman Act

Class Action—Settlements—Approval of Settlements—Distribution Plan—Detailed Findings for Appellate Review—Corrugated Container Industry.—On remand, a federal district court made detailed findings in reaffirming its approval of settlements totaling $298 million and a plan for distribution in the corrugated container antitrust litigation in order to enable appellate review of the fairness, reasonableness, and adequacy of the settlements. Factors considered in approving the settlements included: (1) the difficulties of proving a single nationwide price fixing conspiracy with class-wide impact; (2) reasons for accepting a single damage estimate of $300 million from a damage range of $169 million to $524 million; (3) justifications for discounting damages for the period preceding the statute of limitations for purposes of evaluating the adequacy of the settlements; (4) the degree of class support for the settlements; and (5) the benefits accruing to the class. Moreover, individual settlements were evaluated for reasonableness in terms of the strength of plaintiffs' cases, the benefits to the class, and the resources of each defendant. Finally, justifications for the pro-rata distribution plan and an $11 million allocation to a subclass were set forth. In making the more detailed findings, matters of record in the litigation and in companion criminal actions were relied on, and further evidentiary proceedings were deemed unnecessary. See ¶ 9032.80.

Additional Findings of Fact and Conclusions of Law Concerning Certain Class Action Settlements

SINGLETON, D.J.: On December 21, 1979, this court filed herein its Pretrial Order No. 31 and the attached Memorandum and Order approving class action settlements with defendants Boise Cascade Corporation, Champion International, Inc. (and Hoerner Waldorf Corporation), The Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, The Continental Group, Inc., Diamond International Corporation, Dura-Containers, Inc., Green Bay Packaging, Inc., Inland Container Corporation, International Paper Company, Interstate Container Corporation, Longview Fibre Corporation, MacMillan Bloedel, Inc. (and MacMillan Bloedel Packaging, Ltd., and MacMillan Bloedel, Ltd.), Menasha Corporation, Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, Union Camp Corporation, U. S. Corrugated Fibrebox Co., Weyerhaeuser Company and Willamette Industries, Inc. (and Corco, Inc. and Western Kraft East, Inc.). *In re Corrugated Container Antitrust Litigation*, 1980-1 TRADE CASES ¶ 63,163 (S. D. Tex. 1979). Separate final judgments were thereafter entered on January 25, 1980, and February 8, 1980, as to each of the above-named settling defendants pursuant to said orders. (MDL 310 Docket Nos. 1485-1507, 1576)

Various appeals were taken from the foregoing orders and judgments to the Court of Appeals (5th Cir., Nos. 80-1018 and 80-1103). On April 3, 1981, the Fifth Circuit entered its Opinion and Order affirming certain aspects of this court's prior orders and judgments and remanding the cause to this court for two purposes:

> (1) to enter more detailed findings and conclusions concerning the adequacy of all but the two "hardship settlements" [i.e. the settlements with Consolidated Pack-

aging Corporation and Interstate Container Corporation]; and

(2) to enter more detailed findings and conclusions concerning the reasonableness of the formula by which the settlement proceeds for the pre-January 5, 1979, and the hardship settlements are to be distributed to subclass members.

Opinion and Order at 53.

[*Detailed Findings*]

The court now sets forth in some detail all of the factors he considered in approving the settlements in question. In making these more detailed findings of fact and conclusions of law, this court has relied upon matters which were of record in this litigation and the companion criminal cases, *United States v. International Paper Co.*, No. H-78-11, and *United States v Boise Cascade Corp.*, No. H-78-12 (S. D. Tex.), as of the date of its initial approval of the settlements, December 21, 1979. This court has presided over both this class action litigation and the companion criminal cases aris-[76,692]ing out of the alleged price-fixing conspiracy in the corrugated container industry. This court is fully familiar with both proceedings and, in approving settlements, this court relied upon the experience he gained in both matters concerning the nature and the economic structure and organization of the corrugated container and sheet industry, the nature and scope of the alleged price-fixing conspiracy, the conduct of the defendants, and the impact of the alleged conspiracy on purchasers. Accordingly, this court did and does hereby formally take judicial notice of the pleadings, files and proceedings in the companion criminal cases, the evidence introduced at the trial of those cases, and the jury's verdict of acquittal rendered therein on April 27, 1979.

The court also relied to a limited extent on factual information gained in the process of sentencing the thirty defendants in H-78-11 and H-78-12 who pled *nolo contendere*. The presentence reports contained information furnished by both Government and pleading defendant. This information was also in the court's mind at the time of his approval of these settlements.

Finally, the progress of this litigation since these settlements were approved (most notably the trial of the class case against the Mead Corporation) has provided additional information which would be material to the court in evaluating these settlements should it be necessary to reopen the record. This court respectfully submits that it is unnecessary to conduct further evidentiary proceedings, to incur the additional expense of appointing a court expert, or to consider evidence of any facts or events occurring after December 21, 1979; nevertheless, where later events have had a bearing, either to confirm or to refute the court's conclusions, they will be footnoted in this opinion, although not forming a basis for the findings herein submitted. For this limited purpose only, this court hereby formally takes judicial notice of the pleadings, files, and proceedings in this litigation occurring after December 21, 1979, including the evidence introduced at the trial of these class action cases and the verdict of the jury rendered therein on September 13, 1980.

To the extent that any of the findings of fact made herein constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact and Conclusions of Law

The court will first detail those findings which have relevance to all of the settlements. This will include the range of recovery should plaintiffs prevail and considerations going to the likelihood of plaintiffs' prevailing which have equal application to all defendants involved herein. The following section

of this opinion will deal with the settlements individually. The final section will deal with the plan of distribution.

I. *Findings and Conclusions of General Relevance*

A. *The Likelihood of Plaintiffs' Success on the Merits*

In determining the fairness and reasonableness of the settlements, the court has examined the strengths and weaknesses in plaintiffs' case. Sufficient facts have been developed in discovery, in the affidavits and other materials submitted to the court on the class action motions and on the motions for preliminary and final approval of these settlements, in the presentence proceedings for those thirty defendants in the criminal case who pled *nolo contendere*, and as a result of the trial of the criminal case, to permit an evaluation of the risks plaintiffs would face. Set forth below are the most important considerations in that regard.

The plaintiffs would appear to run the following risks in continuing to litigate against the settling defendants. First, the risk that ultimately plaintiffs might not be successful in proving their case on the issues of conspiracy, impact, and damages. Second, the risk that the class might not be certified (for St. Regis and International Paper) or that it might be decertified in the course of continued litigation. Third, the risk of passage of legislation overruling the Supreme Court decisions in *Illinois Brick Co. v. Illinois* [1977-1] TRADE CASES ¶ 61,460], 431 U. S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery* [76,693] *Corp.* [1968 TRADE CASES ¶ 72,490], 392 U. S. 481 (1968). The settlement agreements resolved these difficulties in favor of the class.

1. *Violation*

There are three core elements which a plaintiff in an antitrust case must prove in order to recover: violation, impact, and damages. As to violation, plaintiffs have a substantial case for the propositions that some employees of numerous corru-

gated companies exchanged prices that they were quoting to purchasers and that there was an implied agreement that such exchanged prices would be "honored"—*i.e.*, not significantly undercut. For some employees, for some companies, and for some parts of the country there is more evidence of these activities than for others. For some parts of the country, for some companies, and for most employees, there is no evidence at all of such activities. In the trial of those indicted, every alleged communication of prices adduced into evidence was hotly contested by the defendants, either as to its existence, as to its intent, or as to its meaning under the antitrust laws. In spite of this fact, and the fact that the jury in those cases apparently failed to believe that evidence and acquitted all defendants, the existence of exchanges of information, with an understanding that the recipient's pricing would conform to the price exchanged, is the strongest element of plaintiffs' case.

More serious problems arise in regard to the parts of the country about which there is no evidence. Corrugated materials are typically shipped no more than two hundred miles from the producing plant, because freight is expensive in relation to the product's cost. Prices are usually established at the local plant level, in response to local conditions. Only a small percentage of corrugated containers are sold from a price list. E. g., Cr. Tr. Vol. 82 at 48-52, Vol. 83 at 23-26. These facts make proof of a single large conspiracy difficult, and especially difficult in light of the areas of the country as to which there is little or no evidence of price exchanges. It should also be noted that the indictments alleged a conspiracy east of the Rocky Mountains while the civil complaint alleged a nationwide class of purchasers. There was no evidence from the criminal trial and, apparently, little or no evidence before the grand jury of price exchanges on the West Coast.

Certain characteristics of the economic structure of the corrugated industry tend to support the theory that a price-fixing conspiracy with class-wide effect is unlikely or even impossible.

More than 800 companies sell corrugated containers and sheets in the United States, operating over 1,400 individual corrugated plants. The fragmentation of the industry suggested by these observations is underscored by the relatively low level of market concentration; no company attained a market share higher than 6.3 percent between 1960 and 1977. Settling Defendants' Memorandum in Support of Preliminary Approval of Settlement Agreements at 19. The four largest companies accounted for less than 24 percent of industry shipments in each of those years, and the ten largest companies accounted for less than 44 percent. These are low concentration ratios when measured against the Department of Justice's Merger Guidelines which define a highly concentrated market as one in which the top four companies have a share of 75 percent of more. *Id.*

The following chart shows the market shares[1] of settling defendants during the period 1970-1977:

Settling Defendants' Percentage Share of All Corrugated Products Shipped 1970-1977

Settling Defendant Company	1970	1971	1972	1973	1974	1975	1976	1977
Boise Cascade	1.81	1.78	1.86	1.95	2.03	2.13	2.20	2.17
Chesapeake	.93	.91	.92	.97	.92	.88	.88	.87
Container	6.15	5.80	6.16	6.01	6.19	6.30	6.12	6.07
Continental	2.79	3.17	3.19	3.12	2.93	3.10	2.97	2.87
Diamond	.38	.37	.40	.40	.39	.38	.38	.37
Dura-Containers	—	.28	.30	.29	.26	.22	.25	.25
Green Bay	1.18	1.17	1.32	1.23	1.21	1.23	1.18	1.20
Hoerner-Waldorf (Champion)	3.89	3.70	3.68	3.96	3.98	3.83	3.86	3.86

[1] These percentage figures include defendants' sales of solid fibre, a product which is not the subject of this suit. Thus they may differ slightly from percentage figures used as a basis for settlement negotiations.

[76,694]

Inland	5.05	4.73	5.00	4.66	5.51	5.54	5.52	5.56
International	5.30	5.57	5.90	6.06	6.09	5.73	6.02	5.93
Longview Fibre	1.66	1.58	1.67	1.81	1.87	2.01	1.96	1.94
MacMillan Bl.	1.80	1.73	1.67	1.74	1.60	1.62	1.58	1.64
Menasha	.99	.93	1.01	1.18	1.26	1.29	1.28	1.33
Olinkraft	1.27	1.03	1.08	.89	.87	.81	.76	.78
Owens-Illinois	3.75	3.86	3.82	4.13	4.06	3.81	3.80	3.80
St. Joe	2.28	2.28	2.09	1.96	1.81	1.80	1.82	1.75
St. Regis	3.22	3.21	3.07	2.89	2.85	2.69	2.78	2.48
Stone	1.65	1.76	1.98	2.10	2.25	2.26	2.41	2.35
Union Camp	2.71	2.78	2.81	2.88	2.91	2.72	2.80	2.80
Weyerhaeuser	5.60	5.49	5.33	5.65	5.71	5.72	5.81	5.85
Willamette	2.71	2.82	2.86	2.87	2.85	3.20	3.29	3.29
(Corco and Western Kraft)								

Source: Fibre Box Association National Quarterly Shipment Summaries 1971-1978

Defendants' Preliminary Memorandum at 20.

Defendants have argued that in such a fragmented market the maintenance of a successful price conspiracy would be virtually impossible. *Id.*

A second element of the corrugated industry structure which supports the argument that there is a competitive environment is the existence of several supply sources, so that buyers are free to make purchasing decisions based on competitive price, quality, and services. *Id.* at 21. Generally, corrugated container buyers can choose among a number of sellers located within a feasible shipping distance, and they do in fact switch their business from one supplier to another to a significant degree. International Paper has experienced many gains and losses of customers to other suppliers of corrugated containers on the basis of price, an experience believed to be common to the industry generally. For example, that company sold corrugated containers to 5,255 customer locations in 1973. In 1974 it lost 1,992 of these accounts (37.9 percent), but it gained 1,152 new accounts (21.9 percent). Thus, a total of

3,144 accounts (almost 60 percent) were involved in shifts of business to or from that company. Similarly, from 1974 to 1975, the company lost 1,363 accounts (30.9 percent) but gained 1,323 new accounts (30.0 percent). Thus, again, approximately 60 percent of the company's accounts were involved in shifts of business. In addition, a substantial percentage of the customer locations doubled their orders or decreased them from the order of the prior year by 50 percent or more, indicating a substantial shift in business to or from the supplier. For 1974 this figure was more than 27 percent. Taken together, these figures show that each year there have been very substantial shifts in business. *Id.* at 22.

The chart above indicates shifting of market share points among the group of settling defendants. The chart shows that thirteen of the settling defendants gained market share during the period 1970 to 1977. The most dramatic increases were achieved by six companies, whose percentage increase in market shares were as follows: Stone (42.4 percent), Menasha (34.3 percent), Willamette (21.4 percent), Boise Cascade (19.8 percent), International Paper (11.8 percent) and Inland (10.1 percent). *Id.* Defendants argue that the great majority of these shifts in business and changes in market share can be accounted for by the existence of vigorous price competition, the antithesis of the rigid, price-fixed market which plaintiffs must establish. *Id.* at 23.

A third characteristic of industry structure cited by defendants as evidence of a competitive environment is the ease with which new companies can enter the business. Ease of entry into the corrugated container business is illustrated by the steady growth in the number of companies manufacturing corrugated containers over the period from 1960 to 1975. In 1960, there were 425 companies; in 1965, 524 companies; in 1970, 679 companies; and in 1975, 759 companies. Fibre Box Industry 1975 Annual Report at 24; Defendants' Preliminary Memorandum at 23.

Defendants have provided the court with materials supporting their contention that during the period 1960 to 1977, when the total number of individual corrugated box plants grew by 75 percent, the growth in [76,695] the number of sheet plants was particularly rapid. *Id.* Sheet plants use stamping and cutting machines to convert corrugated sheets to boxes, but lack the costlier machinery for making corrugated sheet from linerboard and medium. They are generally owned by individuals or small companies. The number of sheet plants increased by over 100 percent during the period. The volume of business controlled by the sheet plants also steadily increased, from 5.6 percent of the total square feet of containers produced in 1950, to 9.1 percent in 1960 and 13.2 percent in 1976. Fibre Box Industry 1976 Annual Report at 26 and 1977 Annual Report at 16; Defendants' Preliminary Memorandum at 23-24.

Defendants argue that in light of the foregoing economic evidence planitiffs face substantial difficulties in establishing the existence of a single, widespread conspiracy to raise and stabilize the prices paid by all corrugated container or corrugated sheet purchasers. *Id.*

Without deciding the issue herein, it is sufficient to say that issues of fact are raised by this evidence which would allow a jury to find against plaintiffs on the question of whether this market could have been controlled by a conspiracy.

[*Evidentiary Problems*]

Plaintiffs had serious problems in obtaining admissible evidence on the question of conspiracy *vel non*. Almost all potential fact witnesses were still employed in the industry. Virtually none of the witnesses in criminal trial testified voluntarily and even when compelled to testify under grants of immunity they were obviously reluctant witnesses, often failing to remember incidents in detail and needing frequent reminders

of prior statements (grand jury or interview). Plaintiffs were unable to compel the testimony of these witnesses who were, with one or two exceptions, outside the subpoena power of this court. At deposition, numerous witnesses had refused to answer plaintiffs' questions on fifth amendment grounds and many other witnesses were indicating they would do likewise. *E.g.*, depositions of Beard, Collins, Hermann, Horton, Kurpiel, Luster, Mallory, Medlock, Renshaw, Rogier, Schankler, Thorton, Williams, Wood.

This court had denied three applications of class plaintiffs for access to the grand jury transcripts in the criminal case. Pretrial Order No. 15 (June 4, 1979); Pretrial Order No. 27 (Oct. 10, 1979); Order of July 26, 1979. These transcripts, in view of the refusals of so many witnesses to testify, were the only means for plaintiffs to obtain wide-ranging information about price exchanges in the industry.

An assessment of these problems of proof, as opposed to a simple assessment of the actual facts on the question of conspiracy *vel non*, led the court to believe that the class's case was quite a difficult one to prove.

In this regard, it should also be noted that one factor which the court considered, not discussed by the Court of Appeals in its opinion, was the ability of the attorneys in this litigation. In presiding over the numerous pretrial conferences and in studying the extremely numerous motions and briefs filed in this litigation, the court had an excellent opportunity to assess the parties' attorneys. Overall, the defendants' counsel were outstanding; all were widely conversant with antitrust law and very experienced in antitrust litigation. As a practical matter, this factor had some influence on the court's assessment of the adequacy of these settlements. The court was also impressed by the industry and ability of the class's attorneys, but on the whole they lacked the trial experience of the defendants' counsel. The relative inexperience of the Government attorneys was a significant factor in the trial of the criminal case.

2. *Impact*

Impact, in a class action, must be susceptible of class-wide proof. *Alabama v. Blue Bird Body Co.* [1978-1 TRADE CASES ¶ 62,041], 573 F. 2d 309 (5th Cir. 1978). The fragmentation of pricing decisionmaking in the corrugated industry and the absence or paucity of evidence of price exchanges in some parts of the country create problems of proof in this regard. The solution foreseen by the court when it certified the class was expert economic evidence concerning the probable impact on *all* prices of the alleged price tampering in major or key markets. Such economic evidence was certain to be contested on these grounds: defendants argue that the corrugated product is not standardized in any respect; nor is it, with limited exceptions, sold from a price list. Settling Defendants' Memorandum in Support of Preliminary Approval of Settlement Agreements at 25-26. They also argue that virtually every industry in the country ships one or more of its products in custom-made cor-[76,696]rugated containers. The dimensions, structure, style, and other characteristics of these containers vary widely not only among industries but also within each industry. *Id.*

There is substantial evidence that containers are sold in local markets. Prices are affected by local factors, such as energy, labor, taxes, freight, equipment, and product mix. As a rule, plants in one area do not compete with those located in any other area, and the prices charged in one market are not affected by those charged in another market. Defendants assert that this lack of interdependence rebuts any inference of nationwide conspiracy or impact. *Id.* at 26.

There is also evidence that container prices are in most instances negotiated by local plant personnel on a customer-by-customer basis. Typically, each plant is operated as a separate profit center and prices are determined by the plant manager or plant sales manager. In this context, the effect of the alleged conspiracy on each purchaser would depend on the interplay of

local market conditions and other particular circumstances, such as customer purchasing practices, which surround each sales transaction. *Id.* This question of impact is, in this court's opinion, not only an open question but also a close one.

3. *Damages*

Even if plaintiffs established a conspiracy with class-wide impact, the proof of damages would present some serious problems. Defendants have furnished industry and government information showing that the real price (*i.e.*, adjusted for inflation) of corrugated materials declined over the period of the alleged conspiracy, that the industry is characterized by low profits and low after-tax return on investment.[2] Prices for corrugated rose less sharply than the Consumer Price Index between 1960 and 1977, at a time of relatively high capacity utilization and high demand, and including the period of elimination of price ceilings. *Id.* at 31.

[*Estimated Range of Damages*]

The plaintiff-proponents of the settlements submitted the expert opinion testimony of Dr. Richard C. Hoyt, who estimated the damages which resulted from the alleged conspiracy. Plaintiffs submitted two affidavits of Dr. Hoyt in connection with proceedings before the court concerning the approval of

[2] It should be noted that in the trial of the class case, some evidence was introduced that would lend support to the proposition that the low profits in the corrugated industry are the result of the integrated companies' decision to maximize the profitability of their paperboard mills, and that the proper index of the ultimate profitability of the corrugated industry is to be found in the overall profitability of the mills *and* corrugated products divisions. Civ. Tr. Vol. 48 at 182-83, Vol. 50 at 143-148. The evidence on this point was not implausible, but it was certainly not very conclusive. Whatever may be the truth of this proposition, it had not been raised at the time of the final approval of these settlements.

the settlements. The first affidavit, dated April 10, 1979, estimated the potential damages as ranging between $185,753,000 and $789,036,000. Hoyt Aff. ¶ IV at 13. The second affidavit, dated May 15, 1979, was filed in response to the memoranda and supporting affidavits filed in opposition to the settlements by the objectors. Dr. Hoyt attended the hearing held by this court regarding the final approval of the settlements on December 3 and 4, 1979. He testified at that hearing, and was available for and subject to cross-examination by the objectors.

Dr. Hoyt, who is the president of an economics consulting firm, has extensive experience as an expert economist and has testified on damages issues in numerous court cases. He was qualified both by training and experience to render an opinion in this litigation concerning the amount of damages which the plaintiff classes may have sustained in this litigation. Hoyt Aff., App. A. Indeed, Dr. Hoyt had extensive previous involvement in this litigation, which gave him the opportunity to gain considerable information regarding the corrugated container industry.

Dr. Hoyt's involvement in this litigation began in June of 1978, when he was retained by plaintiffs' counsel to study and analyze the corrugated container industry in connection with class action certification proceedings. Hoyt Aff. at 6. That review and analysis included the examination of the documents submitted to the federal grand jury that indicted certain of the defendants in this case, industry publications, trade association statistical reports, financial statements of certain of the defendants and the opinion of the United States Supreme Court in *United States v. Container Corp. of America* [1969 TRADE CASES ¶ 72,675], 393 U. S. 333 (1969), in which observations were made concerning the economic structure of the corrugated container industry. See Affidavit of Richard C. Hoyt, dated July 15, 1978. Dr. Hoyt also prepared a supplemental affidavit, dated [76,697] August 10, 1978, in connection with the class

certification proceedings, after he had reviewed the voluminous affidavits and exhibits submitted by the defendants concerning the economics of the industry. In his supplemental affidavit, he expressly recited that he had read and considered the defendants' affidavits.

On July 28, 1978, Dr. Hoyt was requested by plaintiffs' counsel to begin work on estimating the damages that may have resulted from the alleged price-fixing conspiracy. Hoyt Aff. at 7. In connection with his research, Dr. Hoyt also reviewed data concerning other subindustries within the pulp and paper industry for possible construction of a "yardstick" model of damages. In December of 1978, Dr. Hoyt traveled to Houston to review and analyze documents in the plaintiffs' and defendants' document depositories, and he conferred with Dr. Jeffrey L. Harrison, an economist associated with the University of Houston Law School retained by plaintiffs to assist in the estimation of damages. Hoyt Aff. at 8. On January 10, 1979, Dr. Hoyt traveled to Chicago to the headquarters of the Fibre Box Association (the "FBA"), the principal trade association of the corrugated container industry, to review the economic data available at the FBA. Hoyt Aff. at 8. Dr. Hoyt thereafter conducted additional investigations concerning the available economic data, including numerous conversations with counsel for various settling defendants, to verify statistical data produced by the defendants. Hoyt Aff. at 9. Dr. Hoyt also made a further review and analysis of documents relating to the economics of the industry produced in this litigation and located in the document depositories. Hoyt Aff. at 9. The defendants had previously produced approximately 1.5 to 2 million documents in their document depository pursuant to this court's Pretrial Order No. 3, filed on April 14, 1978. Some of the statistical data obtained from the depositories was subjected to computer analysis for the purpose of better understanding the nature of corrugated container pricing and the factors Dr. Hoyt considered to have affected price variations in the corrugated industry since as early as 1955. Hoyt Aff. at 9.

In order to gain additional understanding of the corrugated container industry and the data produced by the defendants, Dr. Hoyt traveled to New York in March of 1979 and conferred with the chief economists for International Paper Company and St. Regis Paper Company. In their discussions, Dr. Hoyt obtained the benefit of additional background and economic information concerning the corrugated container industry. Hoyt Aff. at 9. Thereafter, Dr. Hoyt had further meetings with Dr. Harrison and plaintiffs' counsel concerning the data made available to him and the methodologies available to estimate damages. Hoyt Aff. at 9-10. As a result of his efforts and those of his assistants, Dr. Hoyt obtained and analyzed the net dollar sales of corrugated materials (gross sales less returns and allowances) of the defendants for the period from 1970 through 1978. Those figures excluded sales to other defendants and intracompany sales to the extent possible. Hoyt Aff. at 11. Dr. Hoyt also obtained the net profit figures on such sales from the defendants. Hoyt Aff. at 11.

From his affidavit it is clear that Dr. Hoyt attempted to obtain and use all of the information available to him. Dr. Hoyt attempted to obtain satisfactory data to enable him to construct a "yardstick" model of damages; *i.e.*, a model based on comparing the performance of the corrugated container industry with comparable industries. He rejected that approach because of the unavailability of appropriate comparison data and, instead, relied upon a "during and after model" based on a comparison of net profits; *i.e.*, a model which compared the profits earned by the defendants during the period of the alleged conspiracy and thereafter. Hoyt Aff. at 2-6.

In opposition to the proposed settlements, certain objectors submitted the affidavits of Professor Albert Madansky and Robert E. Lucas. In addition, sheet plant objectors submitted the affidavit of Professor Sam Peltzman and a study by Professors John W. Allen and Roy F. Gilbert. The objectors did not call or make available as witnesses any of the foregoing

experts at the hearing held by this court on December 3 and 4, 1979. Consequently, unlike Dr. Hoyt, this court did not have the opportunity to observe them and judge their credibility.

The affidavits and studies of Drs. Madansky, Lucas, Peltzman, Allen, and Gilbert disclose that they did not undertake the investigations made by Dr. Hoyt to familiarize themselves with the corrugated industry. Rather, they relied solely on certain publicly available data. The affidavits of Drs. Lucas, Gilbert, Peltzman, and Allen were based upon the analysis of Professor Madansky. For the reasons set [76,698] forth below, the court rejected the damage estimates in the Madansky, Lucas, Gilbert, Peltzman, and Allen affidavits and credited the testimony and conclusions of Dr. Hoyt.

Professor Madansky's approach differed from that of Dr. Hoyt in at least two significant respects. First Professor Madansky compared industry-wide, postconspiracy prices with prices during the conspiracy, whereas Dr. Hoyt compared the postconspiracy profits with profits during the conspiracy. See Hoyt Aff., May 15, 1979, at 1-3. Second, the two studies were based on significantly different assumptions regarding the time period of the conspiracy. The Madansky study assumed the price-fixing preiod to be four years from 1974 through January 25, 1978, whereas Dr. Hoyt based his eight models for calculating the overcharge on varying conspiracy periods, none of which assumed the conspiracy to have persisted after 1976 and five of which assumed it to have ended by 1976. Compare Madansky Aff. with Hoyt Aff., April 10, 1979, at Table 2.

Based on the evidence before the court at the time of settlement approval, including the evidence in the criminal trial, the court finds Professor Madansky's assumption concerning the time period of the conspiracy to be unsupported by any evidence. By contrast, Dr. Hoyt's assumptions (in his Models 4, 5, 7, and 8) concerning the time period of the conspiracy and its effects were consistent with the evidence before the court. Those models, which the court finds credible, show damages

during the four-year limitations period to range between $169 million and $524 million.

In December 1975, grand jury subpoenas were served on numerous companies in the corrugated container industry, including most of the settling defendants herein. Memorandum in Support of Government's Motion to Enjoin Counsel from Representing Multiple Clients and for Waiver Hearings, May 2, 1978, at 3. The service of such subpoenas would have the natural tendency to terminate whatever conspiratorial activities were then going on in the industry. The grand jury investigation in Houston received widespread notoriety within the industry. See, *e.g.*, Crim. Tr. Vol. 10 at 274-275; Vol. 15 at 6970; Vol. 30 at 15-18; Vol. 35 at 17-18; Vol. 36 at 12-16, 20; Vol. 37 at 60-61; Vol. 38 at 16-20, 63-65, 110; Vol. 40 at 55-56; Vol. 42 at 42; Vol. 43 at 34; Vol. 44 at 47-48; Vol. 45 at 23-24; Vol. 52 at 55-56; Vol. 58 at 31-32. In 1976 and 1977, almost two hundred witnesses were interviewed by the Government or called to testify live before the grand jury. Memorandum in Support of Government's Motion, *supra* at 4-5. It is thus implausible that conspiratorial activity continued after the end of 1975. Therefore, the court did not credit the basic assumption underlying the Madansky study that the conspiracy period should be measured beginning in 1974 and continuing unabated until January 25, 1978, more than two years after the grand jury sent out its subpoenas.

A second serious flaw in the methodology used by Professor Madansky was that it used only a one-month "after" comparison period (March 1978) during which pricing was assumed to be competitive. By contrast, Models 4, 5, 7, and 8 of Dr. Hoyt's study were based on a three-year "after" comparison period (1976-78). See Hoyt Aff., April 10, 1979, at Table 2. The court finds a one-month comparison period to be entirely inadequate for measuring estimated damages in this case.

Moreover, Professor Madansky offered no explanation of why he selected March 1978 as the postconspiracy comparison period and did not disclose to the court how his conclusions would have been affected had a different or longer period been used. As noted in the uncontroverted supplemental affidavit of Dr. Hoyt, March 1978 was the lowest monthly price period in 1978—a volatile price year—and its use thus resulted in the highest possible damage estimate. Hoyt Aff., May 15, 1979, at 5-6. In any event, the court finds that the selection of a comparison period of a single month in a period of volatile price movement, rather than a longer period or an average, causes Professor Madansky's estimates to be unreliable. Another problem with the Madansky study, as noted in Dr. Hoyt's Supplemental Affidavit of May 15, 1979, is that it yields a negative overcharge figure when applied to industry data for 1973. This casts doubt on the validity of the overall study. See Hoyt Aff., May 15, 1979, at 6-9.

For all of the foregoing reasons, the court rejected the conclusions of the Madansky study. As noted, the conclusions of Professors Lucas, Peltzman, and Allen were based in large part on Professor Madansky's analysis and thus suffer the same flaws.

In addition, Professor Peltzman's conclusion that sheet plants were injured 1.571 [76,699] times greater than container purchasers appears unacceptable to the court, because his conclusion was not reached by comparing the price movement of sheets to the price movement of containers but solely on the unsupported assumption that if container prices were raised $10, then sheet prices were also raised $10. There is evidence in the record quite to the contrary, which shows that prices were raised by percentage points, not by exact dollar amounts, and that sheet prices were at times raised in smaller percentages than container prices. See Sheet Plant Representatives Atlas and Rollins' Memorandum in Support of Preliminary Approval Settlement with Certain Defendants, and exhibits thereto (D. 1231).

Dr. Hoyt submitted eight alternative models for estimating damages, as set forth in Table 2 of his affidavit of April 10, 1979. Five of these models employed varying base periods ranging from 1970 to 1975 and estimated damages ranging from $168,997,000 to $524,658,000,[3] depending on the base period used. If the court had to go further and select a likely point of damages within this range, it would be at the lower end, because only Model 8, which produces a damage estimate of almost $169 million, assumes that any conspiracy that existed lasted from 1970 through 1975, the time period most closely aligned with the evidence in the criminal case. The court found Dr. Hoyt's analysis in these models to be logical, persuasive, and consistent with the evidence then known to the court. As noted, the court also had the opportunity to observe Dr. Hoyt testify in person and under cross-examination at the settlement approval hearing, an opportunity the court did not have with respect to the objectors' economists.

In his supplemental affidavit, Dr. Hoyt estimated damages using Professor Madansky's price-comparison methodology for purposes of argument. Using Professor Madansky's methodology, but adjusting the termination of the conspiracy to the more realistic date of December 1975 and using a two-year postconspiracy period of 1977-1978 instead of one month (March 1978) as the "after" comparison period, Dr. Hoyt estimated that damages based on *all* industry sales for the four-year period 1973-76 (excluding the negative damages Madansky's study produced for 1973) equaled $663 million. Hoyt Aff., May 15, 1979, at Table 7. If this figure is adjusted to reflect, as does the Hoyt analysis, that the defendants together accounted for only 77 percent of all industry sales, Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements (Apr. 16, 1979) at 10

[3] Table 2 was corrected by affidavit of David Robertson, May 11, 1979. These two figures were originally stated to be $185,753,000 and $530,724,000, respectively.

(footnote), the resultant Madansky-derived damage figure is $510 million and falls within the $168 million to $524 million range of damages the court has found probable based on Dr. Hoyt's analysis. Professor Madansky's methodology when applied to the correct time periods thus supports the court's damage estimates.

[*Profits v. Price Analysis*]

Professor Hoyt's original and supplemental affidavits explained a number of reasons why he preferred his "profits" anaylsis to the "price" analysis used by Professor Madansky. For example, Dr. Hoyt stated that he considered "profit" analysis more reliable to account for cost fluctuations and that, in his view, the profit data available to him at the time of his study was more reliable than the price data available at that time. Hoyt Aff., May 15, 1979, at 2-3. The court finds that both methodologies are appropriate for estimating the range of potential recovery in cases such as this. Where, as here, the two methodologies yield consistent results when applied to the same periods, there is no need to accept or reject either one. Nevertheless, the court does reject the objectors' criticism of Dr. Hoyt's use of profits rather than prices to reach his conclusions. First, objectors suggest that profits are affected by external factors that vary in impact from year to year. This is true: but when external factors affect profits, they also affect prices and costs in the same ways. The court finds no evidence that external factors affected prices, costs, or profits differently in relation to each other during 1970-75 than they did during 1976-1978. Second, objectors suggest that profits are a deficient measure of the overcharge caused by a price-fixing conspiracy because profits fail to account for the fact that costs may be artifically high due to inefficiencies on the part of the conspirators. But this is theory only: none of the objectors pointed to any evidence of cost inefficiencies that existed in the

corrugated industry before but not after 1975; none suggested how these might be quantified if they did exist; and uncontradicted evidence at the criminal trial in[76,700]dicated that defendants tried to reduce costs between 1970 and 1975. Crim. Tr. Vol. 73 at 18, 39. Third, the objectors argue that Dr. Hoyt's profit figures were derived from industry sources without any significant check on their accuracy. This is true only in the sense that Dr. Hoyt did not conduct formal discovery as to each defendant or an audit of each defendants' financial records. But it is also true that the price data relied upon by objectors' experts also was derived from industry sources without any more check on the accuracy of such data than Hoyt made of the profit data.

[*Pre-limitations Period Damages*]

While the court hereinafter finds that the plaintiffs' chances of recovering damages on a class-wide basis prior to the limitations period are lower than for the limitations period, the court would nevertheless find that the range of damages for the entire period 1960-1975, assuming the conspiracy began by 1960, would not exceed $856 million to $2,467 million. Though neither Dr. Hoyt nor Professor Madansky attempted to measure dollar damages during this 16-year period, there is no reason to assume that the range of the percentage overcharge found likely by the court to have prevailed during 1970-1975 did not also prevail during 1960-1969. Industry sales in 1960-1975 were $50,522 million according to the 1975 FBA Annual Report. Assuming that the defendants accounted for 77 percent or $38,902 million of the industry sales during 1960-1975 (an assumption that, because of industry trends to concentration, Crim. Tr. Vol. 95 at 68-69 and Defendants' Joint Exhibit 34, probably credits the defendants with more sales than they made), the possible range of damages attributable to defendants' sales between 1960-1975 is derived by multiplying de-

fendants' sales by the low (2.2 percent) and high (6.8 percent) percentage overcharges found by Hoyt to have prevailed in 1970-1975.

Because of the difficulties, outlined below, which plaintiffs face in proving fraudulent concealment, the extra problems of proving a price-fixing conspiracy going back eight to twenty years before trial, and the additional difficulties of proving damages suffered in the earlier years of such a lengthy period, the court was convinced at the time of settlement approval that the chances of substantial recovery for the years before 1973 were significantly reduced from the post-1973 period. The court therefore finds that the adequacy of the settlement amounts should be primarily measured against the estimated range of damages for the limitations period, subsequent to March 7, 1973.

Plaintiffs have the burden of proof on the fraudulent concealment issue. There was evidence in the criminal trial that some employees made efforts to conceal their price exchanges from customers. E.g., Cr. Tr. Vol. 15 at 46-47; Vol. 21 at 11-16; Vol. 24 at 72-76; Vol. 35 at 71-73; Vol. 38 at 63-64. As to proof of *acts* of fraudulent concealment, the court finds plaintiffs had less than an even chance of success.[4] Plaintiffs' most serious problem with their attempt to show fraudulent concealment lies in another element of that legal concept, however: plaintiffs had a much lesser likelihood of proving that class members would not have been able to discover the existence of a conspiracy had they investigated with reasonable diligence. First, there is some doubt whether lack of diligence to acquire it can be proved on a class-wide basis. There is authority for the proposition that these elements are compounded in a class trial because the required due diligence may in some circumstances have to be

[4] It should be noted here that this and similar evidence was adduced in the class trial and that the jury found against plaintiffs on this issue.

proved on a claimant-by-claimant basis. *Krehl v. Baskin-Robbins Ice Cream Co.*, 1978-1 TRADE CASES ¶ 61,870, at 73,654 (C. D. Cal. 1978). Thus, even if at the time of the settlements the class representatives believed there was some significant chance that some class members could prove fraudulent concealment, the probability of success on a class-wide basis was not very great. Second, even as to any individual class member, this case poses an almost unique difficulty of proving fraudulent concealment due to the Supreme Court's celebrated decision in *United States v. Container Corp.* [1969 TRADE CASES ¶ 72,675], 393 U. S. 333 (1969). That highly publicized decision concerned violations of the antitrust laws quite similar to the ones at issue in this case, in the very same industry. Twelve of the defendants in this civil action, including nine of those whose settlements are at issue here, were parties to that case. A decree prohibiting certain price communications by the sellers of corrugated containers was entered on February 6, 1970. Largely because of the [76,701] *Container* decision, and its apparent effect on proof of fraudulent concealment, at the time of the final approval of settlements the court had not even required the production of pre-1970 documents by defendants. See Pretrial Order 11, ¶ 6 (March 15, 1979).

At the time of settlement approval, it was apparent this case would not be tried before mid-1980 at the earliest. Thus, to prove the existence of a conspiracy in the period 1960 to 1965, for example, plaintiffs would have to produce evidence of telephone discussions and other activities which occurred fifteen to twenty years in the past. The difficulties of proving such matters of ancient history are apparent and include the problems of dead or missing witnesses, fading memories, lost or discarded documents, and so forth. Plaintiffs faced such problems to a greater or lesser degree for the entire period outside the statute of limitations. Furthermore both the criminal trial and the grand jury investigation that preceded it dealt almost exclusively with activities occurring since the 1970

decree in *Container*, so that the evidence would have to be developed without the benefit of the Government's power to compel testimony by grants of immunity to overcome the widespread invocation of the fifth amendment.

Likewise proof of damages for the early years of the alleged conspiracy promised to be much more difficult than for the years within the statute of limitations. Not only would there be problems with lost or discarded purchase or sales records but also, as Dr. Hoyt stated in his affidavit, economic data for the earlier years was either not available or not so useful or reliable as for the years within the limitations period. See Hoyt Aff., April 10, 1979, at 11.

For these reasons the court found the chances of substantial recovery for the pre-limitations years to be comparatively slight and evaluated the adequacy of the settlements based primarily on the range of damages potentially recoverable during the statute of limitations period.

To sum up in round numbers the sales in issue during the limitations period were about $10 billion. The sales in issue for the period 1960-1975 were about $39 billion. On the record before him on December of 1979, the court considered a likely percentage overcharge to be about 3 percent.[5] Single damages to the class, based on these figures would then be about $300 million for the limitations period and about $1.17 billion for the longer period. The court finds that the class's chances of recovering for the prelimitations period were less than half as good as for the limitations period.

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[5] In this regard, it should be noted that the jury in the class case found a 5 percent overcharge. Plaintiffs had asked for a 7.7 percent finding. The defendant had declined to submit expert testimony for any overcharge figure. Had the defendant prepared expert testimony of a lesser percentage figure, the jury might well have inclined toward a lower finding on this issue.

4. *Class Support for Settlements and Benefits of Avoiding a Complex and Lengthy Trial*

The Court of Appeals indicated that further detailed findings would also be appropriate on two subjects of general relevance to all settlements, the importance of the class members' support of the settlements and the benefits to the class of avoiding a complex and lengthy trial. The court will therefore address himself to these two issues in some detail.

[*Class Support*]

The manner in which potential class members responded to the notice of the settlements provides further support for the adequacy of the settlements. This court sent notices to more than 200,000 purchasers of corrugated containers. Only 210 of them opted out of the case. Only 18 opt-out cases are presently being prosecuted. A number of the opt-outs changed their minds, and the court granted them leave to opt back into the class. These included Dubuque Packing, ITT, and Iowa Beef Processors, Inc. The court notes that Iowa Beef Processors is represented by the law firm taking the most active role in the pending opt-out cases and that it had already filed a complaint when it petitioned to opt back in and participate in the settlements.

The vast majority of the large corporations which purchased corrugated containers have chosen to remain in the class. Virtually all companies in the Fortune list of the top 1,000 industrial concerns in the United States are class members. Yet only 8 of these opted out and brought their own individual suits. Proctor & Gamble, possibly the largest claimant in the class, with purchases of some $350 million, has elected to remain in the class and to participate in these settlements. By contrast, twenty-two companies, several of which appear to [76,702] have common ownership, and who are members of the container purchaser subclass, represented

by six groups of attorneys, have jointly objected to the proposed settlements. None of these objectors are known to the court to be major American corporations. Two companies with common ownership, represented by the same attorney, who are members of the sheet plant subclass, have jointly objected to the proposed settlements. These objectors are small sheet plant companies who, prior to the settlements, filed a separate case alleging a class of purchasers of corrugated sheets.

The New York law firm of Kaye, Scholer, Fierman, Hays & Handler, a firm enjoying a reputation as antitrust specialists, appeared before the court on behalf of a group of large corporations in support of the reasonableness of the settlements. These included Consolidated Foods Corporation, General Foods Corp., Hartz Mountain Corp., Hershey Foods Corp., Minnesota Mining & Manufacturing Co., Norton Simon, Inc., Pennzoil Co., Texaco, Inc., United Brands Co., and Xerox Corp.—all large companies and substantial purchasers of containers.

Many of the corrugated purchasers choosing to remain in the class are large corporations which have opted out of other paper industry class action litigations in order to bring their own suits. Thus, ITT's subsidiaries (Continental Baking, Gwaltney, O. M. Scott & Sons, and Pierson Candy), United Foods, Borden Company, and Sun Maid Raisin Growers opted out and sued in the Folding Carton cases. Ralston Purina Corp., a large user of corrugated containers, opted out of the class and filed its own action in the Consumer Bag Antitrust Litigation, *Hedges Enterprise, Inc. v. Continental Group,* No. 78-1254 (E. D. Pa.). *None of these companies has opted out of this case.*

The extremely small number of opt-outs, one-tenth of one percent (0.1%), and the continued presence of an overwhelming number of large and sophisticated companies among the class members suggests that the class regarded the settlement terms as fair, reasonable, and adequate.

[*Lengthy and Costly Trial*]

While many antitrust actions are protracted and expensive, this case presents particularly difficult and complicated legal and factual issues. If all defendants went to trial, proof of a conspiracy and impact in this case would involve the introduction into evidence of tens of thousands of pages of deposition testimony, the substance of thousands of documents and advanced economic theories. Lawyers for each of the thirty-seven defendants and representatives of the class would participate at trial to the extent necessary to represent their individual clients.

The trial of this class action against these settling defendants would last for many months, perhaps years. The grand jury investigation of this industry lasted twenty-four months. Approximately 1.5 million documents were subpoenaed to the grand jury and 200 witnesses appeared. The criminal trial related to this litigation involved only two corporate defendants and seven individuals and lasted for three months. The trial of this civil class action would involve issues, such as fraudulent concealment, impact, and damages, which were not litigated in that criminal trial.[6]

The complexity of the issues which would be raised and the evidence which would be presented in a necessarily lengthy trial against thirty-seven defendants raise serious constitutional due process questions concerning a jury's ability to master the facts and reach a reasoned verdict. See *In re Japanese Electronics Litigation* [1980-2 TRADE CASES ¶ 63,421], 631

[6] While the class action trial against Mead Corporation and others commenced after the court approved the settlements and such trial is not part of the record herein, the length of that trial confirms the court's view of the protracted nature of this litigation. In that trial, with only three defendants initially, the evidence took three and a half months to present. The appeals and related attacks upon any verdict would remain in the court system for years thereafter.

F. 2d 1069 (3d Cir. 1980). The existence of thirty-seven defendants might well confuse and burden the jury and seriously predjudice plaintiff's case. The management problems presented by a trial with so many parties are simply beyond the court's imaginative powers.

Such a multidefendant trial would also be enormously expensive to all parties and the court. The parties would incur large legal fees and costs. All parties would lose the valuable time and services of executives and employees involved as witnesses or otherwise involved in preparing the case for trial. Each of the settlement agreements in issue here was entered into in either 1978 or 1979 with the specific under-[76,703]standing that one of its purposes was to save the settling defendant from "further expense, inconvenience and the distraction of burdensome and protracted litigation." Intensive deposition discovery in the class action involving the nonsettling defendants did not commence until the summer of 1979, after the criminal trial related to this litigation was concluded. By that time, the settlement agreements in issue here had been executed and these defendants were not active participants in taking discovery. If these settlements are not effected and defendants elect to try these cases, then discovery will be reopened as these formerly settled defendants would pursue their rights under the Federal Rules. Also, since plaintiffs directed the bulk of their discovery efforts against the nonsettling defendants, much additional discovery would be sought against the settling defendants. It would take a great many months to complete this additional discovery. Any class action trial against the presently settled defendants would not occur until sometime in 1982 at the earliest. At this point, recollections of events and transactions during the alleged period of illegal activity will be further diluted, and the effectiveness of the fact-finding process would be impaired.

[*Other Benefits to Class*]

While the settling defendants are spared the expense of trying the case, this benefit to them was considerably vitiated by their immediate payment of the settlement amounts in 1978 and 1979, and the concomitant loss of income from those funds. In view of the protracted nature of the litigation, including the trial of the nonsettling defendants and subseqient appeals, the immediate payment provided by the settlements constituted a significant financial benefit to the class.

These settlements conferred a further benefit on the plaintiff class by permitting it to reduce the complexity and expense of trial against the remaining nonsettling defendants; plaintiffs were able to streamline their evidence to focus on the conduct of a small group of nonsettling defendants. Thus, they not only saved trial expenses by settling but also improved their chances of success in trial against nonsettling defendants and in defending any resulting verdict on appeal.

The settlement agreements provided for cooperation from the settling defendants that constituted a substantial benefit to the class. Those provisions were intended to save plaintiffs time and expense in the continuing litigation by shifting certain costs to the settling defendants. Plaintiffs' Preliminary Memorandum at 41. The cooperation clauses also made certain information and expertise available to the class which might not have been available through normal discovery. For example, pursuant to the cooperation provisions of the settlement agreements, plaintiffs' counsel arranged conferences between plaintiffs' expert economist, Dr. Richard Hoyt, and the chief economists for International Paper and St. Regis. These conferences provided plaintiffs with background information respecting economic and other aspects of the corrugated container industry and helped plaintiffs refine and test the assumptions being employed in their damages estimates. *Id.* The cooperation clauses also enabled plaintiffs to arrange on-site tours of St. Regis'

corporation headquarters in Pittsburg, Pennsylvania, on April 3, 1979, and International Paper's corporate headquarters in New York City on April 11, 1979, for the purpose of learning the nature and amount of economic and other documentation maintained in the headquarters of a manufacturer of corrugated containers. These visits permitted plaintiffs to refine their discovery requests against the nonsettling defendants, saving fees and expenses to the class members. *Id.* The cooperation clauses constituted a substantial benefit to the class.

The settlements all provided for the funds to be deposited at interest for the benefit of the class pending approval of the settlements and distribution to the class. This was a valuable term supporting the reasonableness and adequacy of the settlements. Assuming that litigation to an interest-bearing judgment of the settled claims would have taken at least four more years, the interest provisions of the settlements alone would require that about $150 million be added to the principal settlement amount of $298 million for purposes of comparing the resulting total of $448 million to a likely judgment.

Most important, these are partial settlements that specifically and explicitly preserved plaintiffs' right to litigate against all remaining defendants for the *entire* amount of plaintiffs' damages, on the basis of joint and several liability, for *all* the injury caused by the conspiracy. The court considered this to be a valuable provision supporting the approval of the settlements. In effect, in each successive settlement, all [76,704] the plaintiffs gave up was the right to recover that settlement amount against the nonsettling defendants.

II. *Findings and Conclusions as to Each Settlement*

In approving the settlements, this court determined that these settlements, collectively, were fair, adequate, and reasonable to the plaintiff classes. The settlements were viewed collectively for several reasons. First, approval of these settle-

ments was not sought on a piecemeal basis but rather as a single group of settlements totaling $298 million in the aggregate. Second, as set out at length in the section describing the history of settlement negotiations in the Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements (at 3 to 28), plaintiffs negotiated each of the indidual settlements as a part of an overall strategy designed to achieve the maximum aggregate recovery on behalf of the class from all of the defendants as a group; it is therefore appropriate to evaluate the settlements collectively. Third, each settlement reduced the amount ultimately recoverable at trial only by the amount thereof, thereby rendering it inappropriate to consider each individual settlement in isolation measured against the range of the total possible damages recoverable for the entire case. In other words, although each defendant is jointly and severally liable for the entire range of damages, obtaining a larger settlement from any of these settling defendants would not necessarily have increased the overall amount recovered from the group. The nonsettling defendants remained liable for *all* of the damages which might ultimately be established at trial, less the amounts paid in settlement after the damage award was trebled. Fourth, and perhaps most important, the fairest and most reasonable measure of the adequacy of the settlements depends on assessing the total damages suffered by the class resulting from the conduct of all of the defendants taken together collectively, and comparing that with the total amount to be paid by the defendants. In sum, then, the settlements came before this court as a collective whole negotiated as part of a unified settlement strategy that produced an enormous settlement fund of great benefit to the class.

It is the opinion of this court, however, that the settlements are also fair, reasonable, and adequate considered individually. This section will discuss the settlements on an individual basis.

As previously stated, in approving these settlements the court considered certain information gained in the process of

sentencing defendants who pled *nolo contendere* in the companion criminal cases. This information included data concerning the defendants' financial circumstances, the Government's assessment of their relative culpability, and material submitted by some defendants in mitigation of punishment. After review by each defendant, his presentence report was sealed and retained by the court. Because of the secrecy which must shield such reports from public scrutiny if those who provide information to the Probation Department and the court are to be candid and helpful, all references to such materials are appended to this opinion under seal. In addition, because of the extreme sensitivity of the issues of the relative likelihood of a determination of liability on a defendant-by-defendant basis, the court's assessment of the class's chances of prevailing against each defendant are also contained in that sealed appendix. Any published predictions of this nature by the court could not help but profoundly influence the course of the litigation in the opt-out cases.

A. *St. Regis Paper Company*

The first settlement negotiated was with St. Regis Paper Company, for $1.7 million. This constitutes a payment of $428,000 per percentage point of St. Regis's 3.97 percent share of the defendants' market.[7]

St. Regis had responded to the grand jury subpoena but was not indicted. The Government considered thirteen St. Regis employees to have participated in illegal price-fixing activities, but none were indicted.[8]

This settlement was negotiated before a class was certified and at a point at which ultimate certification was by no means

[7] Throughout this opinion, statements of defendants' market shares are based on Fibre Box Association data.

[8] Throughout this opinion, statements of the number of employees considered co-conspirators is taken from the Government's Bill of Particulars in the criminal case, unless otherwise noted.

certain. Defendants contended that under the guidelines set forth in *Alabama v. Blue Bird Body Co.* [1978-1 TRADE CASES ¶ 62,041], 573 F. 2d 309 (5th Cir. 1978) certification was impossible because of the localized pricing and individualized prod[76,705]ucts which characterize the industry. This position, supported to some extent by the evidence, made the risk that a class would not be certified an important factor. By the terms of the settlement, the alleged plaintiff class was assured of recovering this $1.7 million even if certification was denied.

At the time this settlement (and all subsequent settlements) was negotiated, a number of legislative proposals had been made to provide indirect purchasers with a cause of action for price-fixing and to give defendants the right to show that plaintiffs had passed on any overcharge to indirect purchasers. Antitrust Enforcement Act of 1978, S. 1874, H. R. 1942, 95th Congress, 2d Sess. 1978. Such litigation would very seriously impair the direct purchaser class's ability to recover substantial damages. Although St. Regis sought a provision that would allow it to withdraw in the event such legislation was passed, by the terms of the settlement, St. Regis was entitled to relief in the event of such legislation's being enacted during 1978 only. That date has now passed, and whatever may be the ultimate fate of these and similar bills, the class is protected. At the time these settlements were approved, predictions were that some such legislative change was probable. Affidavit of H. Richard Wachtel in Behalf of St. Regis Paper Co. in support of Settlement Agreement, at 10. The settlement, in effect, shifted the risk of such a change in the law to St. Regis.

This settlement required St. Regis to provide extensive informal discovery of considerable potential benefit to the class. For example, the court has detailed above the assistance provided to Dr. Hoyt in analyzing the economic data. St. Regis also agreed to provide documents tending to show the fungibility of corrugated containers and to raise no objection to the surrender of their grand jury transcripts by the St. Regis

employees who testified during the government investigation. Pursuant to this part of the agreement, St. Regis made available to the class confidential information filed with the Cost of Living Council. Although St. Regis produced no "smoking guns" (not surprising for a company not indicted), this basic industry and market data was clearly of great value to the class in organizing discovery against the other defendants.

This partial settlement (and all the others in this litigation) specifically preserved the class's right to litigate aginst all remaining defendants for the entire amount of class damages, on the basis of joint and several liability of antitrust joint tort-feasors, less the actual amount of the settlement. At the time these settlements were approved, the nonsettling defendants could have responded to a judgment for the entire range of damages. Nonsettling defendants Alton, Crown-Zellerbach, Fibreboard, Georgia Pacific, Mead, Potlatch, and Westvaco had a combined working capital of over $1 billion. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, Exhibit C.

Based on information from Moody's Industrial Manual, St. Regis's net working capital in 1977 was $522,134,000 and its net after-tax income for 1977 was $106,786,000. *Id.* The court considers the class's chances of prevailing against St. Regis for the limitations period to have been slight. This finding is based primarily on the fact that St. Regis was not indicted, although it was investigated by the grand jury and although, since St. Regis was a party to the *Container* decision, a considerable amount of evidence about it was available to the Department of Justice.[9]

The class's chances of prevailing for the prelimitations period were somewhat slighter for St. Regis than for some other

[9] In this regard, the court has heard some evidence about St. Regis during the class trial and the jury in that case identified St. Regis as a co-conspirator. Of course, since St. Regis had settled and was not represented in that trial, the evidence specifically implicating it was not contested.

defendants, because St. Regis's presence in the *Container* case would be more likely to put its customers on notice and to raise a duty to investigate than would be the case for companies not involved therein.

This settlement was advantageous to the class. It did not detract from the class's chances of prevailing for the entire range of damages; in fact, through discovery benefits and the streamlining of the class case against defendants, it enhanced them. It was the first one negotiated and, in addition to the benefits already detailed, broke the ice and brought other defendants to the point of serious negotiations. St. Regis was an appropriate candidate for the initiation of settlement negotiations because the likelihood of prevailing against it was lower than against many other defendants. The court had access to the documents produced to the grand jury by [76,706] St. Regis. According to the affidavit of St. Regis's attorney, which was not challenged, nothing in those documents indicated that St. Regis had participated in a conspiracy. It is extremely difficult to put a dollar value on the ice-breaking effect of the St. Regis settlement, but based on the court's long familiarity with the parties, attorneys, and issues in the case, the court finds the St. Regis settlement to make up in that respect for whatever it lacks in hard dollars. The St. Regis settlement, which was originally supported by even the class representative appellants, Plaintiffs' Memorandum of Dec., 1978, p. 6, is fair, reasonable, and adequate and its final approval is hereby reaffirmed.

B. *International Paper Company*

The second settlement negotiated was with International Paper Company, for $8.3 million. This constitutes a payment of $1 million per percentage point of International Paper's 8.3 percent share of the defendants' market.

International Paper is the second largest manufacturer of corrugated materials. It has had extensive involvement in antitrust cases concerning this industry. In 1939, it was charged

with criminal violations of the Sherman Act. In that prosecution (*United States v. National Container Assn.*), the NCA, twelve regional container associations, twenty-seven corporations and twenty-eight individuals were charged with price fixing and production limitation agreements on shipping containers. Only one corporation and two individuals went to trial, the prosecution being dropped with respect to all other defendants on April 23, 1940, when a consent decree was entered in a companion civil case. International Paper was a party to the *Container* case, concluded in 1970. It was also a defendant in the 1974 paper label price-fixing case (*United States v. H. S. Crocker, Inc.*) and the 1976 folding carton case (*United States v. Alton Box Board Co.*). In both those actions it pled *nolo contendere* and was fined.

Based on the Corrugated grand jury investigation, the Government identified forty-five International Paper employees as participants in the alleged conspiracy; four were indicted for the misdemeanor (pre-1975) period. International Paper was indicted for the felony (post-1974) period. The corporation and four employees pled *nolo contendere* and were sentenced by this court.[10]

International Paper's settlement followed by one month the settlement of St. Regis Paper Company, the first defendant to settle with the class. After the St. Regis settlement became public, a number of indicted and unindicted defendants contacted plaintiffs regarding the possibility of settlement, but none of these tentative contacts produced concrete offers substantially better than the $428,000 per percentage point of defendant's share of the market paid by St. Regis. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements at 8.

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[10] In this regard, it should be noted that the jury in the class trial found International Paper to be a member of the alleged conspiracy.

In an effort to develop a strategy to break this logjam and determine a consistent precertification settlement value for the entire case, the Plaintiffs' Steering Committee met in New York City on August 9, 1978. The Steering Committee reviewed a report on plaintiffs' review of the grand jury documents, the Government's recently filed Bill of Particulars, the history of settlement overtures, the possible impact of the Fifth Circuit's recent opinion in *Alabama v. Blue Bird Body Co.* [1978-1 TRADE CASES ¶ 62,041, 573 F. 2d 309 (5th Cir. 1978), and the recommendation of the Plaintiff's Ad Hoc Settlement Committee, which had available to it certain tentative damage projections by plaintiffs' economist, Dr. Richard Hoyt, and by one of the defendants' economists. *Id.* at 9. All members of the Steering Committee thought that something had to be done with at least one major indicted defendant to break the ice and that it was appropriate to offer more favorable terms to the first defendant to settle. *Id.* The Steering Committee also agreed that International Paper was a logical candidate to break the settlement impasse, since it had previously indicated a willingness to pay significantly more than the St. Regis settlement level. Also, the Steering Committee believed that International Paper's substantial market share would make the total amount of the settlement high enough to have an impact on the remaining defendants and would provide the class with substantial funds to prosecute the case against the remaining defendants. *Id.*

[76,707] The settlement with International Paper was for $1 million per percentage point of its market share. A settlement with all defendants at this rate would have yielded $100 million, the preclass-certification value the plaintiffs' committee had ascribed to the case. At the time that International Paper settled, no other defendant was willing to pay a comparable amount to settle these cases. *Id.*

The size and timing of the International Paper settlement was a critical factor in enabling plaintiffs to achieve additional, higher settlements from many of the remaining defendants.

Like the St. Regis settlement, this settlement was negotiated before a class was certified and while *Illinois Brick* legislation was pending. International Paper's sales were explicitly left in the lawsuit against the other defendants. The settlement agreement provided for even more extensive discovery benefits for the class than had the St. Regis agreement. International Paper specifically agreed to remain subject to this court's jurisdiction and the Federal Rules of Civil Procedure for discovery purposes and to waive its own attorney-client and work-product privileges. The court has detailed above some of the information furnished to the class as a result of this settlement in relation to Dr. Hoyt's research.

Counsel for all sixty-one named plaintiffs unanimously approved the settlement at the time it was made and at the preliminary approval hearing. Memorandum in Support of Plaintiffs' Motion for Tentative Approval of Proposed Partial Settlements With Defendants International Paper Co. and St. Regis Paper Co. at 6. This group of counsel included some of the most experienced and respected antitrust counsel in the nation.

Based on information from its financial statements, International Paper's net working capital in 1977 was $574.5 million and its net income after tax for that year was $237.7 million.[11]

The class's case against International Paper is much stronger than its case against St. Regis. There is fairly extensive evidence which tends to support this defendant's participation in the alleged conspiracy if the initial problems of class certification and nationwide agreement, impact, and damages are resolved in the class's favor. Set against this is the fact that International Paper's profits are generally lower than the

[11] Throughout this opinion, statements of defendants' net working capital and net after-tax income are based upon Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, Exhibit C.

average for the industry, Industry Survey by Arthur Andersen & Co., International Paper Co.'s Memorandum in Support of Preliminary Approval of Settlement agreement at 25; and that there is evidence of large shifts of business to and from International Paper, Memorandum of Settling Defendant's in Support of Preliminary Approval of Settlement Agreement at 22, both factors tending to disprove participation in a price-fixing conspiracy. As was the case with St. Regis, the involvement of International Paper in the *Container* case somewhat diminishes the class's chances of prevailing for the prelimitations period as against other defendants not involved therein. This settlement is advantageous to the class. It did not detract from the class's chances of prevailing for the entire range of damages; in fact, through discovery benefits and the streamlining of the class case against other defendants, it enhanced them. It was the first settlement negotiated with an indicted defendant and had a significant impact on the willingness of other defendants to enter into serious settlement discussions. This settlement was originally supported by even the class representative appellants; it is fair, reasonable, and adequate and its final approval is hereby reaffirmed.

C. *Union Camp Corporation*

The third settlement was with Union Camp Corporation, for $7.4 million. This constitutes a payment of $2 million per percentage share of the defendant's market. Actually, Union Camp's share is 2.7 percent, but its wholly-owned subsidiary Allied Container (not a defendant in MDL 310) was included for settlement purposes. This raised Union Camp's share to 3.7 percent and also set a precedent for the inclusion of the sales of subsidiaries of later-settling defendants.

Union Camp had responded to a grand jury subpoena during the Corrugated investigation, but neither it nor any of its employees were indicted. Union Camp was a party to the 1939

case, *United States* [76,708] *v. National Container Assn.*, and to the 1969 *Container* case.[12]

This settlement was negotiated after the class had been certified but while a petition for mandamus to decertify was pending. *Illinois Brick* legislation was, of course, also pending. The class, after class certification, was demanding $3 million per percentage point from unindicted defendants and $5 million from indicted defendants. The indicted defendants, refusing to consider such demands, were organizing to resist payment of more than the $1 million per point paid by International Paper. The unindicted defendants were also organizing to explore the possibilities of a group settlement. The class attorneys reasonably feared a stalemate in settlement negotiations if the defendants managed to present a united front. The settlement with Union Camp served the strategic purpose of breaking up the organization of the unindicted defendants into one negotiating block. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements at 14.

The Union Camp settlement, reached after certification, was regarded by the class attorneys as a precedent-setting one: every clause was strenuously negotiated. *Id.* at 15. In addition to the inclusion of Allied Container's sales, there were five areas of initial disagreement: the removal of Union Camp's sales from the case, relief in case Congress passed *Illinois Brick* legislation, relief in the event the class was decertified, relief in the event a significant number of class members opted out, and a "most favored nation" clause to prevent the class's settling with other defendants on more favorable terms. As to the first, Union Camp's sales were not removed from the case. (This is

[12] In this regard, it should be noted that the jury in the class trial found Union Camp not to be a member of the alleged conspiracy. As a result, Union Camp may be entitled to collateral estoppel on the issue of its participation in the alleged conspiracy if the settlement is now reversed.

true of all the settlements.) As to the second, Union Camp was given some protection against early passage of *Illinois Brick* legislation; this clause has been rendered moot by the passage of time. As to the third, Union Camp had no right under the settlement to withdraw in the event of decertification. As to the fourth, Union Camp had the right to withdraw if a certain percentage of class members both opted out and filed their own suits; this clause has been rendered moot by the small number of opt-outs. Finally, a "most favored nation" clause was drafted which prevents plaintiffs' class from settling on more favorable terms with a similarly situated defendant but allows the class the freedom to recognize legitimate differences among defendants (as to culpability or ability to pay) and material occurrences in the litigation (such as changes in law, discovery of new facts). *Id.* at 15-16.

Union Camp remained subject to the court's jurisdiction as a party for discovery purposes. The Union Camp settlement is more favorable to the defendant than the International Paper settlement only in respect to discovery. It was reasonable to expect that an unindicted defendant would not have more useful investigative materials than International Paper. Also, at the time of the Union Camp settlement, nonsettling defendants were strenuously contesting International Paper's turning over many of the materials requested by plaintiffs and it was not clear whether broad discovery agreements would be implemented. *Id.* at 16.

According to information from Moody's Industrial Manual, Union Camp's net working capital for 1977 was $203.5 million and its 1977 after-tax income was $114.6 million.

The class's chances of prevailing against Union Camp were no better than against St. Regis. This settlement provided a substantial sum; did not detract from the class's chances for prevailing for the entire range of damages; provided valuable discovery rights to the class; streamlined the litigation; and was instrumental in inducing further settlements at higher prices.

The court's finding that it was fair, reasonable, and adequate is reaffirmed.

Perhaps a word should be said here about the class attorneys' technique of offering discounts to early settlers. These first three settlements, and especially the first two, were negotiated at dollar amounts which in themselves do not closely correlate to the three defendants' potential liability. Nevertheless, as will be seen as we progress through the history of this litigation, this strategy was designed to achieve a maximum aggregate recovery for the class and the fact that the later settlements were at considerably higher rates tends to show that the strategy was successful. Certainly, the coercive impact of such a strategy, combined with the law on joint and several liability and right to [76,709] contribution, is increasingly great as one settlement succeeds another.[13] These three early settling defendants were chosen to implement this strategy. The history of the Plaintiffs' Ad Hoc Settlement Committee and, after certification, the Plaintiffs' Steering Committee's strategy has been detailed by plaintiffs in connection with the preliminary approval of these settlements. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements, pp. 8-16. The court finds that this strategy was not only reasonable but also successful and that it produced an aggregate settlement fund greater than would have been possible through negotiations based strictly on defendants' market shares. The court therefore finds that the strategic benefits of these three early settlements were of great ultimate importance to the class and that such benefits bring all of them within the range of approval by the court.

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[13] Counsel for Weyerhaeuser has stated that absent such tactics it would certainly have settled for less. Weyerhaeuser Co.'s Proposed Findings and Conclusions Concerning the Adequacy and Fairness of Its Settlement at 2 n. 1.

D. *Dura-Containers, Inc.*

Shortly after the Union Camp "ice-breaker," the class negotiated settlements with five unindicted defendants. Dura-Containers settled for $750,000, which constitutes a payment of $2 million per percentage point. Dura is a small company, with only a fraction of a percentage point share of the market. It has no previous involvement in the antitrust litigation concerning this industry. It was not indicted, nor were any of its employees. No evidence in the criminal trial implicated it.[14]

Based on information supplied by Dura, its 1977 working capital was $6 million and its 1977 after-tax income only $1.2 million. This settlement represents a quarter of its net profits for the years 1972-1976. Memorandum of Settling Defendants in Support of Preliminary Approval of Settlement Agreements, Exhibit C at 2. The payment of this amount (by letter of credit with 11 percent interest to the date of payment because of cash flow problems) therefore represented a substantial hardship to the company.

The class's chances of prevailing against Dura were very small indeed. In comparison to other unindicted companies, Dura's small size and the absence of any prior record of antitrust violations provided the class with virtually nothing to use against it. Not only is it unlikely that Dura could pay a much larger sum, but the expense to the class to engage in discovery and to litigate against Dura would be out of proportion to the amount it could hope to recover. The presence of "clean" companies such as Dura in a mass trial would be prejudicial to the class's chances of recovering against even the more culpable defendants.

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[14] It is noted that the class jury found it not to be a participant in the alleged conspiracy. This would, of course, raise the same collateral estoppel issue as Union Camp's, should this settlement be reversed.

The Dura settlement provided the same advantages to the class in regard to class decertification risks and the retention of its sales in the case as the earlier settlements. In addition, Dura is entitled to no *Illinois Brick* protection, no right to relief based on opt-outs, and no "most favored nation" protection. Dura remained a "party" for discovery purposes.

Considering the extreme weakness of the case against Dura and the other factors detailed above, the court reaffirms its finding that this settlement was fair, reasonable, and adequate.

E. *Diamond International Corporation*

Diamond, like Dura, is a very small company. It settled for $1 million, representing $2 million per percentage point of it and its subsidiaries' market share. Like Dura, Diamond was unindicted and the court has no knowledge of a prior record of antitrust violations. No evidence in the criminal trial implicated it.[15]

Based on information from Moody's Industrial Manual, Diamond's 1977 net working capital was $164.7 million and its 1977 after-tax income was about $47 million.

The findings the court has made with regard to Dura's possible liability apply to Diamond as well. Although Diamond could pay a larger sum than Dura, the expense to the class to pursue the case against it and the probable harm to the class's case against other more culpable defendants both militate in favor of settlement with Diamond.

The Diamond settlement provided the same advantages to the class in terms of class decertification, *Illinois Brick* legislation, percentage of opt-outs, retention of sales, "most favored nation" clause, and [76,710] discovery provisions as the Dura settlement. Considering the extreme weakness of the case against Diamond and the other factors detailed above, the

[15] It is noted that the class jury found it not to be a participant in the alleged conspiracy, possibly raising a collateral estoppel defense.

court reaffirms its finding that this settlement is fair, reasonable, and adequate.

F. *Chesapeake Corporation of Virginia*

Also shortly after the Union Camp "icebreaker," the class negotiated a settlement with Chesapeake Corporation of Virginia for $3,024,000, or $2.4 million per point of market share of Chesapeake and six subsidiaries.

Chesapeake was investigated by the Corrugated grand jury but neither it nor any of its employees were indicted. The Government did consider a dozen of its employees to have been implicated in antitrust violations. Unlike many of the defendants, Chesapeake (and its subsidiaries) does not have a national accounts sales force or national price lists or pricing policies for corrugated materials, which fact may tend to disprove its national involvement. Affidavits of Chesapeake employees filed in support of Defendants' Joint Supplemental Memorandum in Opposition to Plaintiffs' Motion for Class Certification.

Based on information from Moody's Industrial Manual, Chesapeake's 1977 net working capital was $19.7 million and its 1977 after-tax income $10 million.

Although Chesapeake and its six subsidiaries account for 1.26 percent of the defendants' market, each of the seven entities is rather small.

The class's chances of prevailing against Chesapeake were only slightly better than against Dura and Diamond.[16] This settlement provides a substantial sum and also provides the class with benefits similar to the Dura and Diamond settle-

[16] In this regard, it is noted although not relied on herein that the class jury found Chesapeake not to be a member of the alleged conspiracy, thus presenting some collateral estoppel issues if this settlement is reversed.

ments, except that some relief was available to Chesapeake if the percentage of opt-outs who filed suit had been sufficiently high. This clause has now been rendered moot. The settlement is fair, reasonable, and adequate.

G. *Longview Fibre Company*

Longview Fibre Company negotiated a settlement for $6,450,000, or $2.5 million per percentage point of Longview's 2.58 percent of the defendants' market.

Longview was investigated by the grand jury but neither it nor any of its employees were indicted. The Government considered six Longview employees to be implicated in the alleged conspiracy. No evidence as to Longview or its employees was adduced in the criminal trial.

Based on information from Moody's Industrial Manual, Longview's 1977 net working capital was $24,490,000 and its 1977 after-tax income was $27.5 million.

As with most of the other unindicted companies, the class's chances of prevailing against Longview were not very substantial.[17]

This settlement, in addition to a substantial sum of money, provided that Longview's sales be retained in the case, that Longview remain a "party" for discovery purposes, and that Longview would receive no relief in the event of class decertification or *Illinois Brick* legislation. Limited protection was provided based on percentage of opt-outs, but this clause has now been rendered moot. The settlement is fair, reasonable, and adequate.

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[17] In this regard, it should be noted that the class jury found Longview not to be a member of the alleged conspiracy, raising the collateral estoppel issue already mentioned should this settlement be reversed.

H. *Willamette Industries, Inc. (including Western Kraft East, Inc., and Corco, Inc.)*

Willamette Industries negotiated a settlement for $11,286,000, or $2.7 million per percentage point of its 4.18 percent share of the defendants' market.

Willamette was investigated by the Corrugated grand jury but neither it nor any of its employees were indicted. The Government identified twelve employees as coconspirators, but no evidence implicating Willamette was adduced in the criminal trial.[18] An unusually large percentage of Willamette's corrugated business is conducted west of the Rocky Mountains, an area for which the grand jury decided not to indict. Arthur Andersen & Co. Survey of the Corrugated Industry 1972-1976.

Based on information from Moody's Industrial Manual, Willamette's 1977 net working capital was $67 million and its 1977 after-tax income was $48 million.

[76,711] In addition to this substantial sum of money, the class obtained the benefits already described under the Longview agreement. The class's chances of prevailing against Willamette were not very substantial. This settlement is fair, reasonable, and adequate.

I. *Menasha Corporation*

Menasha Corporation settled for $4,592,250, or $2.75 million per point of its 1.67 percent share of the defendants' market.

Menasha was investigated by the grand jury but neither it nor any of its employees were indicted. The Government

[18] In this regard, it should be noted that the class jury found Willamette, Corco, and Western Kraft not to be members of the alleged conspiracy, raising the collateral estoppel issue already mentioned should this settlement be reversed.

identified eight employees as coconspirators, but no evidence implicating Menasha was introduced at the criminal trial.[19]

Menasha is a family-owned business, with a relatively small percentage of the corrugated market. Memorandum of Settling Defendants in Support of Preliminary Approval of Settlement Agreements, Exhibit E at 2. Its net worth was about $105 million and, according to Dun & Bradstreet figures, its 1977 net working capital was $32 million and its 1977 net profit $10 million.

In addition to this substantial sum of money, the class obtained the benefits already described under the Longview agreement. The class's chances of prevailing against Menasha were not very substantial. This settlement is fair, reasonable, and adequate.

J. *Boise-Cascade Corporation*

Boise-Cascade negotiated a settlement for $9,891,000, or $3.5 million per point of its 2.8 percent share of defendants' market.

Boise-Cascade was indicted for pre-1975 violations of the Sherman Act. The Government identified nineteen employees as coconspirators, and two of them, both general managers, were also indicted at the misdemeanor level. Boise and its two employees pled *nolo contendere* and were sentenced by this court.

Boise was the second indicted defendant to settle with the class. The indicted defendants had requested a conference with the court to try to convince the court that they should pay no more than the $1 million per point agreed to by International Paper. After this conference, which took place on December

[19] In this regard, it should be noted that the class jury found Menasha not to be a member of the alleged conspiracy, raising the collateral estoppel issue already mentioned should this settlement be reversed.

13, 1978, and at which the class attorneys announced that they had concluded a settlement with an *unindicted* defendant (Union Camp) for $2 million per point, the Plaintiffs' Steering Committee met and determined to seek $4 million per point from misdemeanor indicted defendants and $5 million per point from felony indicted defendants. They also determined to offer a lower rate ($3.5 million for misdemeanor, $4.5 million for felony) to the first settler from each group, in order to break up the indicted defendants' coalition to resist settlements at higher rates than International Paper's. Boise was chosen as the first misdemeanor defendant to be offered this rate, since it had been the first seriously to discuss settlement with the class. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements at 19-20. At the time this agreement was negotiated, the petition for mandamus on the class certification ruling was still pending; also pending was *Illinois Brick* legislation and a recently filed motion by a nonsettling defendant for permission to file a cross-claim for contribution against St. Regis and International Paper. (The granting of such a motion would render further settlements virtually impossible.)

In addition to the resolution of the above enumerated issues in favor of the class, the Boise settlement provided a substantial sum of money to the class, broke up the indicted defendants' coalition to resist higher rates, established a new benchmark for settlements, left Boise's sales in the case, and left Boise a "party" for discovery purposes. The limited relief available to Boise in the event of numerous opt-outs has now been rendered moot.

Boise is a large company. Based on figures from Moody's Industrial Manual, its 1977 net working capital was $275 million and its 1977 after-tax income $115.6 million. It is, therefore, capable of responding in judgment for the whole range of damages.

The class's chances of prevailing against Boise are relatively good for the nearly two years of the limitations period up until the end of 1974, and they are also relatively good for the prelimitations period. There is very little evidence for the felony (post-1974) period. Of course, if found to be a conspirator at some time, Boise would remain liable for the damages caused by other [76,712] conspirators until it withdrew from the conspiracy; there was not much evidence before the court on the likelihood of Boise's establishing withdrawal by around the end of 1974, but the court had heard during the criminal trial the sort of arguments that could be made for withdrawal based on evidence which would be available to Boise; *i. e.*, of antitrust compliance programs, antitrust information furnished to employees, and evidence showing a decline in the incidence of price communications with competitors. Based on this familiarity with similarly placed defendants arguments, Boise's case for withdrawal could not be ignored by the court in evaluating this settlement. This factor was considered in connection with all misdemeanor indictee settling defendants.

Considering the problems with the case against Boise and the benefits furnished to the class by the settlement, the court determines that settlement to be fair, reasonable, and adequate.

K. *Hoerner Waldorf (Champion International Corporation)*

Champion International Corporation entered into a settlement agreement with the class for $24,120,000, or $4.5 million per point of its 5.36 percent of defendants' market. Champion was settling the claims against Hoerner Waldorf Corporation, with which company Champion merged in February, 1977. Hoerner ceased to exist as a corporate entity upon the merger. Before the merger, Champion did not make or sell corrugated.

Hoerner was indicted for the post-1974 (felony) period in this case, and two of its employees were indicted for the pre-1975 (misdemeanor) period. The Government had identified

fifty-five employees of Hoerner as coconspirators. Hoerner was also indicted in the 1976 *Folding Cartons* case and was a defendant in the 1939 *National Container Association* case.[20]

Hoerner and one of its employees pled *nolo contendere* in the criminal case and were sentenced by this court. The trial of the other Hoerner employee was severed because of his severe ill health; the indictment against this employee was dismissed by the Government after the acquittals.

Champion had been among the first defendants to approach the class attorneys to discuss settlement. The Plaintiffs Steering Committee decided to offer the opportunity to Champion to be the first postcertification felony defendant settler at $4.5 million per point, and Champion accepted that offer. In addition to the quite substantial amount of money paid to it, the class also received benefits similar to those described in relations to the Longview settlement.

The settlements with Boise and Hoerner at rates approaching plaintiffs' demands and the near advent of the trial in the criminal case undetermined the efforts of the indicted defendants to negotiate as a group and led to a feverish willingness to discuss settlement with the class at the rates the class had sought to reach, and even above those rates, in some cases.

Based on information from Moody's Industrial Manual, Champion's 1977 net working capital was about $444.5 million and its 1977 after-tax income $138.6 million. Champion ranks sixth in corrugated sales and is financially sound.

Hoerner did not have an antitrust compliance program before its acquisition by Champion, the only large company not to do so. The class's chances of prevailing against Hoerner/Champion were relatively good. The settlement reflects this fact, being one of the largest in terms of dollars.

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[20] Hoener was found by the class jury to be a member of the alleged conspiracy.

The settlement is fair, reasonable, and adequate.

L. *Container Corporation of America*

Container Corporation of America (CCA) entered into a settlement agreement with the class for $34,240,000, or $4 million per point of its 8.56 percent of defendants' market.

CCA and two of its employees were indicted for misdemeanor violations of the Sherman Act. All three pled *nolo contendere* and were sentenced by this court. CCA was the first named defendant in the 1969 *Container* case. Because of CCA's prominence in that case, it is reasonable to assume that the Government would have sought a felony indictment against it if there had been evidence to support CCA's involvement after 1974.[21] The Government identified 47 CCA employees as co-conspirators.

CCA is the largest manufacturer and seller of corrugated materials in the United States. Based on information from Moody's [76,713] Industrial Manual, its 1977 net working capital was nearly $189 million and its net after-tax income for 1977 was $55,765,000. This settlement amount constituted about 42 percent of CCA's net before-tax profits from its corrugated division for the years 1970-1974. Memorandum of Settling Defendants in Support of Preliminary Approval of Settlement Agreement, Exhibit B at 2.

After the Union Camp settlement, the class received numerous offers to engage in serious settlement negotiations, including one from CCA. In order to be better able to evaluate these overtures, class counsel met on December 17-20 with two economists, Dr. Hoyt and Professor Jeffery Harrison, a Ph.D. economist with the University of Houston College of Law. These economists prepared a report for the Steering Committee to study. On December 26, the Court certified the two

[21] The class jury found CCA to have been a member of the alleged conspiracy.

subclasses of container purchasers and sheet plants. The class attorneys met on January 5 to discuss appropriate settlement figures and a plan of allocation between the subclasses. The sheet plant subclass was not prepared to go forward with settlement negotiations at that time, but the container purchaser subclass wished to take advantage of the pressure being placed on the remaining defendants by the impending criminal trial, scheduled to begin on January 15. Representatives of this subclass therefore met with counsel for CCA on January 6 and demanded and received payment of $4 million per point, with $1,369,600 earmarked for possible allocation to the sheet plant subclass. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements at 20-24. The other benefits the class received were similar to those described in connection with the Boise settlement.

The class's chances of prevailing against CCA were about the same as for Boise for the limitations period. They were somewhat less than as against Boise for the prelimitations period because of CCA's prominence in the Container case.

Considering the risks of litigation against CCA and the benefits to the class, this settlement is fair, reasonable, and adequate.

M. *Weyerhaeuser Company*

Weyerhaeuser Company entered into a settlement agreement at the same time as CCA, for $39,150,000 or $5 million per point of its 7.8 percent share of defendants' market. Weyerhaeuser and two of its employees were indicted for felony violations of the Sherman Act. Two other Weyerhaeuser employees were indicted for misdemeanor violations. Weyerhaeuser and one misdemeanor employee pled *nolo contendere* and were sentenced by this court. The other misdemeanor and two felony employees went to trial in the criminal case and were acquitted. In other antitrust litigation, Weyerhaeuser was indicted in the *Folding Carton* case in 1976

and was a party to the *Container* case in 1969. The Government identified 34 employees of Weyerhaeuser as co-conspirators in the *Corrugated* case.[22]

Weyerhaeuser is the third largest manufacturer and seller of corrugated products in the United States. According to information taken from Moody's Industrial Manual, its 1977 net working capital was $530 million and its 1977 net after-tax income was almost $394 million.

The class's chances of prevailing against Weyerhaeuser were relatively good, comparable to those against Hoerner, although evidence in the criminal trial established that Weyerhaeuser's prices, adjusted for inflation, declined during the alleged conspiracy period. Cr. Tr. Vol. 10 at 133-36, Vol. 62 at 64-67. For the prelimitations period, Weyerhaeuser's participation in the *Container* case somewhat diminishes the class's chances of success.

Considering the risks of litigation against Weyerhaeuser and the benefits to the class (similar to those described for Boise), this settlement is fair, reasonable, and adequate.

N. *MacMillan Bloedel, Inc. (including MacMillan Bloedel Packaging, Ltd., MacMillan Bloedel Container, Inc., and MacMillan Bloedel Ltd.)*

MacMillan Bloedel, Inc., entered into a settlement agreement with the class for $8,440,000, or $4 million per point of its 2.11 percent share of defendants' market.

Neither MacMillan Bloedel nor any of its employees were indicted. In the case of MacMillan Bloedel, however, this is not an indication that there was no evidence implicating it. Quite a large number of its employees had obtained grants of immunity from the Government in exchange for their testimony during the grand jury investiga[76,714]tion. The Government identi-

[22] The class jury found Weyerhaeuser to have been a member of the alleged conspiracy.

fied 28 MacMillan employees as coconspirators and listed 21 of them on its trial witness list. These employees had been quite informative about price exchanges with employees of most of the defendants, which exchanges, of course, also implicated MacMillan Bloedel. Set against this in terms of establishing MacMillan's liability is the fact its prices were consistently below the industry average. Arthur Andersen & Co. Survey of Corrugated Industry 1972-1976.

MacMillan was treated by the class attorneys as a misdemeanor indictee rather than an unindicted defendant for determining a rate per market share point. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements at 25.

MacMillan is a Canadian company. Before June 1972, it had a very small corrugated division which it had operated since 1966. In 1972 MacMillan acquired the corrugated plants that constituted the Hankins Division of Flintkote. MacMillan thus had no exposure before 1966 and rather insignificant exposure before 1972, even if fraudulent concealment were found to toll the statute of limitations. Based on information from Moody's Industrial Manual, MacMillan's 1977 net working capital was nearly $293 million and its 1977 after-tax income $38,349,000.

Considering these facts, the relatively good chance of recovering against MacMillan, the risks of continued litigation, and the benefits conferred upon the class, the settlement is fair, reasonable, and adequate.

O. *Owens-Illinois, Inc.*

Owens-Illinois, Inc. (O-I) entered into a settlement with the class for $32.7 million, representing $6 million per point of its 5.45% of defendants' market.

O-I and three of its employees were indicted for felony violations of the Sherman Act. O-I and one defendant pled

nolo contendere and were sentenced by this court. The other two employees went to trial and were acquitted. In that case the Government identified *30* O-I employees as coconspirators. O-I was a party to the 1969 *Container* case.[23]

O-I got in touch with the container subclass attorneys the week before the criminal trial was set to begin and the settlement was concluded in short order. A total possible allocation of $2,289,000 was earmarked for the sheet plant subclass. The other benefits to the class were similar to those described for the Longview settlement.

O-I is a substantial company, ranking fifth among the nation's manufacturers of corrugated materials. According to figures obtained from Moody's Industrial Manual, it 1977 net working capital was $394 million and its 1977 after-tax income $91 million.

The chances of the class's prevailing against O-I are relatively good. It should be noted here, however, that much of the evidence as to the two high-level O-I employees who were acquitted in the criminal case came from a former co-worker whose credibility was seriously undermined on cross-examination. Had Mr. Marshall's testimony not been so questionable, the case against O-I generally would have been much stronger. O-I had an antitrust compliance program; and, of course, its prior involvement in the Container case presents additional problems for the class in showing fraudulent concealment.

Considering the strength of the class's case against O-I, the risks of litigation, and the benefits conferred upon the class by the settlement, the court finds it fair, reasonable, and adequate.

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[23] The class jury found O-I to have been a member of the alleged conspiracy.

P. *Olinkraft, Inc.*

Olinkraft entered into a settlement agreement with the class for $7,350,000, representing $6 million per point of its 1.2 percent share of defendants' market.

Olinkraft and two of its employees were indicted at the felony level. The company and one employee pled *nolo contendere* and were sentenced by this court. The other employee went to trial; the Government dismissed the indictment against him at the close of the evidence, after the court indicated its inclination to instruct an acquittal. The Government identified sixteen employees of Olinkraft as coconspirators (the fewest of the indicted defendants). Olinkraft was not indicted in the *Folding Carton* or *Consumer Bags* cases, nor was it a party to the *Container* case.[24]

Olinkraft is a rather small company. It operated only nine plants during the relevant period, in a belt running .hrough [76,715] the central United States from Michigan to Louisiana. According to data from Moody's Industrial Manual, its 1977 net working capital was $46.7 million and its 1977 after-tax income nearly $34.6 million. The settlement eradicated Olinkraft's net profits, before tax, for the entire period 1960-1977. Memorandum of Olinkraft, Inc., in Support of Preliminary Approval of its Settlement Agreement, attached as Exhibit F to settling defendants' preliminary approval memorandum.

As to the class's chances of prevailing against Olinkraft, they are relatively good (as is true of all felony indictees). The sum paid by Olinkraft was large in relation to its income, however. The other benefits accruing to the class under the settlement were similar to those described in connection with the Boise settlement. This settlement is fair, adequate, and reasonable.

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[24] The class jury found Olinkraft to have been a member of the alleged conspiracy.

Q. *The Continental Group, Inc.*

The Continental Group entered into a settlement agreement with the class for $27,430,000, representing $6.5 million per point of its 4.2 percent share of defendants' market.

Continental and one of its high-ranking employees were indicted for felony violations of the Sherman Act. Both went to trial and were acquitted. The Government identified forty-four Continental employees as co-conspirators. Continental was a party to the *Container* case.[25]

Continental began negotiating at the beginning of the criminal trial and settled quickly. Being one of the last to settle before the acquittals, it paid the highest rate of any defendant. The sum it paid the class was in excess of its 1970-1977 income from the Corrugated Division. Cr. Tr. Defendant Continental Exhibit 85. According to information from Moody's Industrial Manual, Continental's 1977 net working capital was $321.8 million and its 1977 after-tax income was $143.8 million.

The class's chances of prevailing against Continental are clearly not so good as they would have been had there been a conviction in the criminal trial, which would have made a *prima facie* showing of liability in the civil cases. The amount paid in settlement reflects this; it defies belief that Continental would have paid such a sum immediately after the acquittals. Although the chances of prevailing against Continental were (and remained) relatively good compared with many other defendants, the size of this settlement is clearly due in part to Continental's fear of a possible conviction. These circumstances cannot be duplicated now. This settlement, which affords the class the additional benefits described in connection with the Boise settlement, is fair, reasonable, and adequate.

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[25] The class jury found Continental to have been a member of the alleged conspiracy.

R. *St. Joe Paper Company*

St. Joe Paper Company entered into a settlement agreement with the class for $12,468,750, representing $4.75 million per point of its 2.6 percent of defendants' market.

St. Joe and two of its employees were indicted for misdemeanor violations of the Sherman Act in the companion criminal case. All three pled *nolo contendere* and were sentenced by this court. The Government identified twenty-two St. Joe employees as coconspirators. In previous antitrust litigation, St. Joe was a party to the *Container* case.[26]

Based on information from St. Joe's financial statements, St. Joe's 1975 net working capital was $18.8 million and its 1975 after-tax income was nearly $23.8 million.

Like the other settlements negotiated in this period around the beginning of the criminal trial, the St. Joe settlement was at a high rate. In fact, St. Joe, Inland and Stone paid the highest rate for misdemeanor indictees. In addition, St. Joe provided the same type of benefits to the class as have been detailed above in terms of class decertification protection, *Illinois Brick* legislation protection, the retention of its sales in the case, and discovery benefits. A provision granting St. Joe relief from its agreement in the event of numerous opt-outs has become moot.

As is true for the other misdemeanor indictees, the class's chances of prevailing against St. Joe in the pre-1975 period are relatively good. St. Joe's involvement in the *Container* case somewhat reduces the class's chances of prevailing for the prelimitations period.

This settlement is fair, reasonable, and adequate.

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[26] The class jury found St. Joe to have been a member of the alleged conspiracy.

S. *Inland Container Corporation*

Inland Container entered into a settlement agreement for $34,627,500, represent-[76,716]ing a payment of $4.75 million per point of its 7.3 percent of defendants' market.

Inland and one of its employees were indicted for misdemeanor violations in the companion criminal case. The Government identified forty Inland employees as coconspirators. Inland was a party to the *Container* case.[27]

Inland is a large company, ranking fourth in corrugated sales. Based on information from Moody's Industrial Manual, its 1977 net working capital was $46 million and its 1977 after-tax income almost $22 million.

The class's chances of prevailing against Inland were similar to those as against St. Joe. The Inland settlement provided the same benefits to the class as the St. Joe settlement.

This settlement is fair, reasonable, and adequate.

T. *Stone Container Corporation*

Stone Container paid the class $14,511,250, representing $4.75 million per point of its 3 percent of defendants' market.

Stone and two of its employees were indicted at the misdemeanor level in the companion criminal case. The Government identified twenty-four Stone employees as coconspirators.[28]

Based on information from Moody's Industrial Manual, Stone's 1977 net working capital was $43.5 million and its 1977 after-tax income was $10 million.

The class's chances of prevailing against Stone were similar to its chances against Inland and St. Joe, except that Stone's

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[27] The class jury found Inland to be a member of the alleged conspiracy.

[28] The class jury found Stone to be a member of the alleged conspiracy.

noninvolvement in the *Container* decree somewhat strengthens the class's prelimitations case. The Stone settlement conferred upon the class similar benefits to those described above for St. Joe and Inland.

This settlement is fair, reasonable, and adequate.

U. *U. S. Corrugated Fibrebox Company*

U. S. Corrugated entered into a settlement agreement with the class for $3,069,120, representing $4 million per point of its .77 percent share of defendants' market.

U. S. Corrugated was not indicted. The Government identified four of its employees as coconspirators, but none were indicted. To the court's knowledge, U. S. Corrugated has no prior relevant antitrust involvement.[29]

U. S. Corrugated is a small company. Based on financial data provided by it, its 1977 net working capital was a little less than $3.9 million. The settlement sum was paid in five installments, the final installment being paid in January of 1980.

U. S. Corrugated is unable to respond in damages for a much larger sum. The class's case against it is weak, comparable to the case against Dura and Diamond.

This settlement is fair, reasonable, and adequate.

V. *Green Bay Packaging, Inc.*

Green Bay Packaging entered into a settlement agreement with the class for $5,557,500, representing $3.25 million per point of its 1.7 percent of defendants' market.

Neither Green Bay nor any of its employees was indicted, although the Government identified eleven Green Bay employ-

[29] The class jury found U. S. Corrugated not to have been a member of the alleged conspiracy, raising the collateral estoppel issue already described.

ees as co-conspirators. To the court's knowledge, Green Bay has no previous involvement in pertinent antitrust litigation. Green Bay has consistently and vigorously protested its innocence of any violation of the Sherman Act in this case.[30]

Based on information supplied by Green Bay, its 1976 net working capital was $20.5 million and its 1976 after-tax income was $8.88 million. Green Bay gave a promissory note, with interest, due March 1, 1981.

The class's case against Green Bay is weak, comparable to the case against Dura and Diamond.

This settlement is fair, reasonable, and adequate.

III. *The Plan of Distribution*

The plan of distribution submitted by the settlement proponents and described in the class notice provided for all class members to participate in the settlements pro rata based on the dollar amount of their purchases from defendants, regardless when the purchases were made, from which defendant they were made, where the purchases were made, or what products were purchased. This plan of distribution was entirely [76,717] separate from and independent of the settlements and was separately considered and approved by the court.

Only one class member objected that the claims period should be for less than eighteen years. That class member, Avtex Fibers, Inc., in a two-sentence filing on October 25, 1979, proposed "that the distribution be based on purchases during a shorter time period, beginning at a date later than January 1, 1960, and extending through 1978." Although a Houston attorney filed that objection, no counsel for Avtex appeared at the hearing to explain or argue its objection. Avtex did not

[30] The class jury found Green Bay not to have been a member of the alleged conspiracy, raising the collateral estoppel issue already described.

appeal from the court's approval of the plan of distribution. The sheet plant objectors did not object to the plan of allocation. It is true that the sheet plant objectors, in the course of objecting to the adequacy of the settlement amount, argued that a plan of allocation including prestatute of limitations purchases would mean that this court should base his judgment of the adequacy of the settlement on the possibility of recovering pre-statute of limitations damages, too. This court did not take the sheet plant objectors' argument to constitute an objection to the plan of allocation. This court, upon ruling against the sheet plant objectors pursuant to the adequacy of the settlements, and having found the settlements adequate whether judged on the basis of a four-year period or a sixteen-year period, then perceived no objection to the plan of allocation other than the one of Avtex mentioned above. Given the overwhelming, near unanimous approval by over 200,000 class members of the plan of allocation, it seemed inappropriate to upset the proposed plan.

All the settlements release the claims of all class members for the entire eighteen-year period of the alleged conspiracy. Thus it is appropriate that some compensation must be given for purchases made in the pre-statute of limitations period. Because most class purchases were made by large volume consumers, such as General Foods, Procter & Gamble, or General Motors, it seemed plausible that most class members would have claims in both the statutory four-year period and the prelimitations period. The claims that were submitted confirmed that fact.[31]

As the court has previously stated, the prelimitations case is not so strong as the limitations period case, and it is therefore arguable that early claims should be paid on a reduced basis.

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[31] Large claims (over $1 million in purchases) represent less than a third of the total claims filed but account for more than 95% of the dollars purchased by claimants. Report of Arthur Andersen & Co. on Claims Processing, Exhibit 8 at 1.

There are, however, several factors which will automatically reduce the basis for payment of these early claims. One is the payment of estimated claims on a lower rate than claims substantiated by hard records; one is the smaller volume of claims from the early period; and one is the operation of price inflation.

As to the first, after the appeals are exhausted on this issue, if the settlements are affirmed, Arthur Andersen & Co. will begin a pilot audit of the claims to determine, among other things, the reliability of estimates and the percentage or percentages that will be paid to claimants for estimated portions of their claims. For example, since many purchasers no longer retain invoices or canceled checks for purchases ten or fifteen years in the past, they have estimated their purchases and stated upon what those estimates were based. Some are based on productoin or sales records, some by extrapolation from records of other years.

It is expected that the class members' recovery for estimates will be for a lesser percentage of the claimed purchase price than their recovery for claimed purchases substantiated by invoices or canceled checks. It is also expected that a higher percentage of the prelimitations claims will be based on estimates than the limitations period claims. This fact, and the fact that fewer claims were filed for the prelimitations period, will automatically decrease the pro rata amount paid for prelimitations claims.[32]

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[32] These assumptions have been confirmed by analysis of the claims filed. The dollar volume of claims based on invoices and canceled checks declined over the period (61% in 1975, 51% in 1973, 27% in 1970, 18% in 1967, 6% in 1960, and the dollar volume of claims based on estimates rose (38% in 1975, 48% in 1973, 72% in 1970, 82% in 1967, and 93% in 1960). Report of Arthur Andersen & Co., *supra*, Exhibit 8 at 4. The number of claims filed also diminished with age (6984 in 1975, 6333 in 1973, 5028 in 1970, 3918 in 1967, and

(Footnote continued on following page)

In addition, corrugated materials cost less in the 1960's than they did in the 1970's. The court takes judicial notice of the fact that inflation has eroded the purchasing [76,718] power of the dollar, so that a payment of for example, $1 per $1,000 worth of corrugated materials purchased in 1960 represents a significantly smaller real value than $1 per $1,000 worth of corrugated materials purchased in 1974.

These three factors, coupled with the fact that the great majority of corrugated materials is purchased by a relatively few large companies who bought throughout the entire alleged conspiracy period, convince the court that the share-and-share-alike plan of distribution is not inequitable.

The complexities and costs of devising and implementing a distribution formula based on the relative value of various claims would be overwhelming. If it is reasonable to weight claims according to "time of purchase," it might require more than just two time periods. For example, purchases made prior to the filing of the Government complaint in *Container* at the end of 1963 might be given a lower weight than purchases made after the Supreme Court's 1969 decision therein, and purchases made between the district court's decision in *Container* in 1967 (declaring the conduct challenged to be lawful) and the Supreme Court's 1969 decision (reversing the district court), still a different weight. It might also be reasonable to weigh those claims with respect to the relative culpability of each seller,[33] the geographical area in which the purchase was

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(Footnote continued from preceding page)

2451 in 1960). *Id.* at 6. Finally, only 9.58% of total dollar purchases claimed are prelimitations purchases derived from invoices or canceled checks. *Id.* at 8.

[33] A purchaser with a claim against a culpable seller stands a better chance of success at trial than a purchaser against whom there is little or no evidence.

made,[34] and the nature of the product purchased.[35] Determination of the proper weight to be given all these factors would have created an administrative nightmare that would have at best delayed and at worst entirely frustrated the distribution of these valuable settlements to the members of the class. Moreover, obtaining the requisite information to achieve weighting on all these factors would cause claim forms to class members to be extremely complex and cumbersome. Accordingly, such weighting would thwart one purpose of the settlements—ease of administration.

The share-and-share alike plan of distribution, opposed by only one class member and not challenged on appeal, reflected the judgment of experienced plaintiffs' counsel that any system of claims weighting based on date of purchase might have required the creation of subclasses and given rise to disputes among class members that wasted energy and effort needed to be directed at the nonsettling defendants to maximize the overall recovery for all class members. The court recommends that decision.

The share-and-share-alike plan of distribution compromised and avoided the complexities and burdens described above, without appreciably affecting the fairness of the settlements to any group of class members. The court therefore found the plan of distribution on balance to be fair and reasonable to all the members of the class.

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[34] For example, at the time of settlement approval there was little evidence that the conspiracy affected purchases west of the Rockies, so that purchases in, say, Florida, which the evidence at the criminal trial showed to have a rather high incidence of conspiratorial activity, might arguably be entitled to a higher return.

[35] Arguably purchasers of more complex and expensive die-cut boxes were damaged more than purchasers of regular slotted containers, or purchasers of sheets.

[*Allocation to Subclass*]

The distribution plan also provided for distribution of the post-January 5, 1979, settlements between the subclasses based on the amounts negotiated between the container purchaser subclass and those settling defendants.

The post-January 5, 1979, settlements provided that the sheet plant subclass could, subject to court approval, apply to participate in these settlements up to the lesser of the two figures: (a) $14.9 million, which was calculated as that portion of the total settlement fund represented by those eleven defendants' total sales of corrugated sheets to all customers (not just sheet plants) in proportion to those defendants' sales of corrugated containers and sheets to all customers or (b) that portion of the settlement fund represented by the ratio of the defendant's sheet sales to sheet plant subclass members to settling defendants' sales of corrugated sheets and containers to all customers. The container purchaser subclass reserved the right to oppose any such application by the sheet plant subclass.

After arms length negotiations between counsel for the container purchaser subclass and Messrs. Montague and Hayes on behalf of the sheet plant subclass, an agreement was reached that the sheet plant subclass would apply for $11,000,000 from the post-January 5, 1979, settlements and that the container purchaser subclass would not oppose such application.

[76,719] The foregoing application was incorporated into a separate settlement agreement (November 29, 1980) negotiated by Messrs. Montague and Hayes on behalf of the sheet plant subclass with all of the post-January 5, 1979, settling defendants, which agreement provided, *inter alia,* for the entry of a consent decree providing injunctive relief to the sheet plant subclass.

Certain container purchaser subclass members objected that the application of the sheet plant subclass was too large.

The opinion of the Court of Appeals in this matter, Appeal Nos. 80-1018 and 80-1103 (Sl. Op. of April 3, 1981, at 20) makes this objection moot.

One member of the sheet plant subclass (Fruit Growers Supply Company) timely filed an objection to the sheet plant subclass's application for the allocation of $11 million from the post-January 5, 1979, settlements; neither Fruit Growers nor any other sheet plant subclass member timely filed an objection to the preliminary or final approval of the sheet plant subclass settlement with the post-January 5, 1979, settling defendants. No member of the sheet plant subclass appeared at the hearing for final approval of the sheet plant subclass settlement for the purpose of objecting.

Proponents of the sheet plant subclass settlement offered a study of three plants of St. Regis Paper Company which indicated that of all corrugated sheets sold, 72 percent were sold to sheet plants. Motion for Preliminary Approval of Settlement Between Sheet Plant Subclass and Certain Defendants, and Exhibit "A" thereto. The $11 million allocation to the sheet plant subclass represents 73.84 percent of the maximum allocation ($14,900,000) the sheet plants would receive *if* all sheets were sold only to sheet plants and to no other customers. This compares favorably with the uncontroverted St. Regis study. Accordingly, under the formula available to the sheet plant subclass, and having found that overall the post-January 5, 1979, settlements are adequate, the allocation of $11 million appears to the court to be fair and reasonable both to the sheet plant subclass and to the container purchaser subclass.

Testimony at the related criminal trial, *United States v. International Paper Co.* Criminal No. 78-H-11 (Kurpiel, Vol. 14 at 116-117), and business records of certain defendants (Memorandum of Sheet Plant Subclass in Support of Preliminary Approval of Settlement with Certain Defendants) indicated at the very least that, at the trial, there was a substantial risk that evidence would establish that purchasers of corrugated

sheets were overcharged to a lesser extent than purchasers of corrugated containers.

Based upon an uncontroverted study presented by the proponents of the sheet plant subclass settlement, the $11 million allocation represents a recovery of approximately 2.88 percent of the total purchase price paid for corrugated sheets for a five-year period assuming that all sheet plant subclass members have filed a claim which includes every sheet sold to them by these settling defendants. The court accepts this study as accurate.

In addition to the $11 million allocation, the sheet plant subclass settlement with post-January 5, 1979, settling defendants provides for the entry of a consent decree providing meaningful injunctive relief relating not only to the violations alleged in the complaints in these actions but also to other alleged marketing practices. Moreover, the consent decree provides for a subclass member to obtain discovery where good cause exists to suspect a violation of the consent decree. The court finds that this consent decree has a substantial value to the sheet plant subclass and clearly enhances the value of the sheet plant subclass settlement with the post-January 5, 1979, settling defendants.

Under all of the circumstances, and especially in light of the special risks involved with respect to the sheet plant subclass in proving damages to the same extent as members of the container purchaser subclass, the court finds that the partial settlements with the post-January 5, 1979, settling defendants in the amount of $11 million together with the injunctive relief provided in the consent decree constitutes a fair, adequate, and reasonable settlement.

For all the reasons set forth herein, the court approves each settlement individually and all collectively, and also approves the plan of distribution.

[Appendix A under court seal.—CCH.]

Appendix B

Settling Defendant	Date of Execution of Settlement*
St. Regis	7-21-78
International Paper	8-24-78
Union Camp	12-20-78
Dura-Container	1-3-79
Diamond	12-22-78
Chesapeake	12-28-78
Longview Fibre	12-21-78

In re CORRUGATED CONTAINER ANTITRUST LITIGATION.

ADAMS EXTRACT CO., et al., Plaintiff-Appellees,

CFS Continental, Inc., et al., Townhouse Furniture, et al., Rossville Packing Co., et al., Denver Meat Co., et al., Carron Manufacturing Co., Andre-Boudin Bakeries, Inc., Ilikon Corp., Great Northern Packaging Corp., et al., Plaintiffs-Appellants-Appellees,

Pleasure Hours, Inc., et al., London Dry Ltd., et al., Plaintiffs-Objectors-Appellants-Appellees,

v.

The CHESAPEAKE CORPORATION OF VIRGINIA, et al., Stone Container Corp., Defendants-Appellants-Appellees.

In re CONTAINER ANTITRUST LITIGATION.

ADAMS EXTRACT CO., et al., Plaintiff-Appellees,

Great Northern Packaging Corp., et al., CFS Continental, Inc., et al., Rossville Packaging Co., et al., Andre-Boudin Bakeries, Inc., et al., Townhouse Furniture, et al., Denver Meat Co., et al., Carron Manufacturing Co., Ilikon Corp., Wittek Golf Supply Co., Inc., Plaintiffs-Appellants-Appellees,

v.

PLEASURE HOURS, INC., et al., St. Joe Paper Co., The Continental Group, Okinfraft, Inc., Container Corporation of America, The Chesapeake Corporation of Virginia, Owens-Illinois, Inc., MacMillan Bloedel, Inc., Inland Container Corp., Menasha Corp., U. S. Corrugated Fibre-Box Co., Stone Container Corp., Defendants-Appellants-Appellees.

Nos. 80-1018, 80-1103

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.*

Unit A

Oct. 29, 1981.

On appeal of multidistrict price-fixing class action which had been remanded, 643 F.2d 195, for more detailed findings of fact and conclusions of law concerning various aspects of settlements which had been approved by the United States District Court for the Southern District of Texas, John V. Singleton, Jr., Chief Judge, the Court of Appeals, Charles Clark, Circuit Judge, held that District Court's additional findings and conclusions concerning its reliance on witness' expert testimony in formulating a range of possible recovery, plaintiffs' likelihood of prevailing at trial, fairness, reasonableness, and adequacy of the settlement agreements, and reasonableness of settlement allocation formula were sufficient to sustain its approval of the settlement agreements.

Affirmed.

1. Federal Civil Procedure 1699

District court, which approved settlements in price-fixing class action, satisfactorily justified its reliance on witness' expert study in formulating a range of possible recovery.

2. Federal Courts 893

Assertion made by objectors to price-fixing settlement that district court's procedure in sealing certain information contained in presentence reports on certain criminal defendants who had pled nolo contendere did not compromise objectors' due process rights failed to present reversible error. Fed.Rules Civ.Proc. Rule 61, 28 U.S. C.A; U.S.C.A.Const. Amend. 5.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

3. Federal Civil Procedure 1699

Findings of district court on ability of price-fixing class action plaintiffs to prevail on merits at trial were clear enough to support its exercise of discretion to approve settlements agreed to by the parties. Clayton Act § 4, 15 U.S.C.A. § 15.

4. Federal Civil Procedure 1707

District court properly exercised its discretion in making findings and conclusions with respect to fairness, reasonableness, [1323] and adequacy of settlement agreements it approved in price-fixing class action. Clayton Act, § 4, 15 U.S.C.A. § 15.

5. Federal Civil Procedure 1699

Price-fixing class action settlement plan did not cause an inequity to any one plaintiff and was approved. Clayton Act, § 4, 15 U.S.C.A. § 15.

Aram A. Hartunian, Marshall Patner, Pressman & Hartunian, Chtd., Chicago, Ill., Michael W. Perrin, Fisher, Roch & Gallagher, Houston, Tex., for plaintiffs-appellants Great Northern Packaging Corp., et al., co-representative of Sheet Plant Sub-Class.

Stephen D. Susman, Terrell W. Oxford, William H. White, Susman & McGowan, Houston, Tex., Vance K. Opperman, McGovern, Opperman & Paquin, Minneapolis, Minn., for class plaintiffs-appellees.

Charles Kadish, Breed, Abbott & Morgan, New York City, for settling defendant Union Camp Corp.

Allen D. Black, Fine, Kaplan & Black, Philadelphia, Pa., Jack Chestnut, Chestnut & Brooks, Minneapolis, Minn., Jerry S. Cohen, Kohn, Milstein & Cohen, Washington, D. C., Jack Corinblit, Marc M. Seltzer, Corinblit, Shapero & Seltzer, Los

Angeles, Cal., Kenton C. Granger, Anderson, Granger, Nagels, Lastelic & Gordon, Overland Park, Kan., Charles Kipple, Houston, Tex., H. Kenneth Kudon, Pantaleo & Kudon, Chartered, Washington, D. C., Seymour Kurland, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., Lowell E. Sachnoff, Sachnoff, Schrager, Jones, Weaver & Rubenstein, Ltd., Chicago, Ill., for plaintiffs' Steering Committee.

H. Laddie Montague, Jr., Howard Langer, Berger & Montague, P. C., Philadelphia, Pa., Lawrence J. Hayes, Maun, Green, Hayes, Simon, Johanneson & Brehl, St. Paul, Minn., for Sheet Plant subclass plaintiffs-appellees; Richard A. Lockridge, John Murray & Associates, St. Paul, Minn., of counsel.

Henry L. King, Davis, Polk & Wardwell, New York City, for undersigned settling defendants.

David E. Bennett, Mark M. Heatwole, Chadwell Kayser, Ruggles, McGee & Hastings, Ltd., Chicago, Ill., for Container Corp. of America.

Fletcher H. Etheridge, Butler, Binion, Rice, Cook & Knapp, Houston, Tex., Harold F. Baker, Alan M. Wiseman, Gaspare J. Bono, Howrey & Simon, Washington, D. C., for appellant The Mead Corp.

Michael H. King, Alexander R. Domanskis, Eric S. Palles, Ross Hardies, O'Keefe, Babcock & Parsons, Kael B. Kennedy, Lee Ann Watson, Katten, Muchin, Zavis, Pearl & Galler, Chicago, Ill., for plaintiffs-appellants-appellees.

James B. Sloan, Sloan & Connelly, P.C., Chicago, Ill., Guido Saveri, Saveri & Saveri, San Francisco, Cal., Phillip C. Goldstick, Goldstick & Smith, Joseph A. Ginsburg, Levin, Ginsburg & Novoselsky, Chicago, Ill., Leonard Barrack, Barrack, Rodos & McMahon, Philadelphia, Pa., Granvil I. Specks, Perry Goldberg, Gary L. Specks, Specks & Goldberg, Ltd., Ellis Sostrin, Sostrin & Walner, Chicago, Ill., Robert H. Weir, Law Offices of Robert H. Weir, San Jose, Cal., Michael J. Freed,

Lawrence H. Eiger, Much, Shelist, Freed, Denenberg, Ament & Eiger, Chicago, Ill., for plaintiff-appellant Container Purchasers.

Appeals from the United States District Court for the Southern District of Texas.

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

CHARLES CLARK, Circuit Judge:

We remanded this multidistrict price-fixing class action for more detailed findings of fact and conclusions of law concerning various aspects of settlements approved by the district court. 643 F.2d 195, 225-26 (5th Cir. 1981). At the same time, we noted that "[n]one of the [objectors'] arguments persuades us that the settlements must be set aside or modified." *Id.* at 202. The district court made additional findings and conclusions and once again approved the proposed settlements.[1] This reapproval is now be[1324]fore us for further evaluation in light of our mandates in the prior remand and the district court's findings and conclusions. Because our mandates have been followed and proper findings support the settlement agreements and the formula for allocating certain of the settlement proceeds among class members as fair, reasonable, and adequate, we find the reapproval to be well within the discretion of the district court and affirm. Since *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ____ U.S. ____, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981), has established that there is no right of contribution under the antitrust laws, the distribution of settlement funds may proceed.

I. *The Remand Instructions*

In remanding this action to the district court, we sought an enlarged factual and legal base upon which to evaluate the

[1] In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D. Tex. 1981).

settlement agreements and allocation formula. The particular requests we made of the district court for information on these distinct issues are summarized below.

A. *The Settlement Agreements*

We enunciated a three-step process for passing on the fairness, reasonableness, and adequacy of the settlement agreements. That process required the district court to evaluate the plaintiffs' likelihood of prevailing at trial and the range of possible recovery at such a trial, to consider other relevant factors, and to determine the point on or below the range of possible recovery at which the settlement was fair, reasonable, and adequate. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 212. In calling for additional information on the range of recovery and likelihood of prevailing at trial, we eschewed any requirement of a high degree of specificity. *Id.* Nonetheless, we found the district court's initial findings inadequate in the following respects.

In crediting Dr. Richard C. Hoyt's expert testimony and establishing $200 to $800 million as the range of possible recovery, the district court failed to compile adequate findings to rebut two of the objectors' criticisms. The objectors argued that Dr. Hoyt's computation wrongly failed to take into account the period preceding the four-year statute of limitations and was the product of defective methodology. The district court was asked to explain why it only considered damages within the statute of limitations period in computing the range of possible recovery. *Id.* at 214. In explaining the district court was requested to evaluate objector's argument that defendants' fraudulent concealment tolled the statute of limitations and enlarged the temporal, and thus, the monetary range of possible recovery. *Id.* In addition, the district court was instructed to consider the difficulties of proving a price-fixing conspiracy and assessing damages for the longer period. *Id.* We also called upon the district court to justify its reliance on Dr. Hoyt's

estimates, rebut the objectors' criticisms of Dr. Hoyt's conclusions, and explain why Dr. Hoyt's conclusions are more accurate than those of the objectors' experts. *Id.* at 215. We then turned to the district court's discussion of the likelihood that the class would prevail on the merits and suggested that the district court more completely explain its conclusions. *Id.* at 217.

Based on the established range of possible recovery and the plaintiffs' likelihood of success, the court was to exercise its discretion and determine the fairness, reasonableness, and adequacy of the settlements. We also instructed the district court to explain and evaluate why it attached importance to factors such as the length, complexity, and expense of an actual trial and the number and importance of parties opting out of the class or objecting to the settlements. *Id.* at 217-18. Furthermore, the district court was directed to make particularized findings as to why each individual settlement was reasonable, or at least to explain why it was unnecessary to do so. *Id.* at 218.

B. *The Allocation Formula*

In order to allocate the proceeds of settlements reached prior to January 5, 1979, the agreements provide that class members file claims based on their purchases between 1960 and 1978 and that the proceeds be distributed to class members in proportion [1325] to those claims. The objectors point out that this formula treats pre-1973 purchases on a par with post-1972 purchases, even though the district court expressed the opinion that claims on pre-1973 purchases might have been barred by the statute of limitations. We called upon the district court to articulate persuasive justifications for the allocation formula. *Id.* at 220.

II. *The District Court's Additional Findings*

A. *Standard of Review*

Our discussion of the district court's additional findings on the adequacy of the settlements and the reasonableness of the allocation formula is best prefaced by the caveat that the essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness. As we stated in our earlier remand, "our appellate function . . . is a limited one, especially in light of the strong judicial policy favoring settlement of disputes." *Id.* at 207. We are limited in reviewing the district court's approval of this reconciliation and cannot upset that approval unless the district court clearly abused its discretion. *Id. See also Cotton* v. *Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977); *Young* v. *Katz,* 447 F.2d 431, 432 (5th Cir. 1971).

B. *Adequacy of the Settlement Agreements*

The district court, in reaching its determination that the settlement agreements, collectively and individually, were fair, reasonable, and adequate, made added findings on or evaluations of each issue and factor we requested. We will discuss, in order, the district court's additional findings with respect to the range of possible recovery, the likelihood of prevailing on the merits, and other factors which, taken together with the first two, affect the judge's exercise of discretion in passing on the fairness of a settlement agreement.

1. *Range of Possible Recovery.*

The district court's additional findings comply with our request that it confront the two central criticisms of its estimated range of possible recovery: that it (i) excludes prelimitations period damages and (ii) relies on the study of Dr. Hoyt which used an unsound method of estimating damages from excess profits. 643 F.2d at 212-15.

The district court set forth detailed findings to support its conclusion that the adequacy of the settlements should be evaluated on the basis of the range of damages potentially recoverable during the statute of limitations period since the chances of recovery for prelimitations period damages were comparatively slight. The court pointed out that in urging defendants' fraudulent concealment tolled the statute of limitations, objectors were required to produce evidence of acts by the defendants designed to conceal the alleged conspiracy and to show that the plaintiffs lacked knowledge of the conspiracy despite the exercise of due diligence.[2] *United States* v. *Container Corporation of America*, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969), which involved twelve of the defendants in this action, and a subsequent decree prohibiting price communications by sellers of corrugated containers, rendered proof of fraudulent concealment all the more difficult. Likewise, proving due diligence classwide on a claimant-by-claimant basis would be particularly difficult. The district court noted that in addition to the difficulty with proof of fraudulent concealment, the plaintiffs would have trouble proving a price-fixing conspiracy and damages during the pre-1973 period due to fading memories, missing or dead witnesses, lost documents and sales records, and the unavailability of reliable economic data. The district court's findings and conclusions support its decision [1326] to discount the prelimitations period damages in its computation of the range of possible recovery.

The district court also explained its reliance on Dr. Hoyt's economic estimate of the range of possible recovery. Dr. Hoyt was eminently qualified to conduct a damages estimate because of his training, experience, knowledge of the industry, and involvement in the case. The district court concluded that his analysis was logical, persuasive, and consistent with the evidence then known to the court. This conclusion is supported by

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[2] The civil jury in the class action against The Mead Corporation ruled against the plaintiffs on the fraudulent concealment issue.

the proof. In addition, Dr. Hoyt testified in person and was subjected to cross-examination which best permitted the district court to pass on his credibility. The district court detailed its reasons for rejecting the objectors' criticisms of Dr. Hoyt's "profits" model of damages and for supporting Dr. Hoyt's methodology and assumptions. For example, it found the Hoyt study produced results consistent with the studies of other experts when those other studies were limited to the period most closely aligned with proof of the conspiracy in the related criminal cases. It found that Hoyt's profit analysis was based on data that was more reliable, or as reliable as that used by others. It found that external factors did not have any different effects on prices, costs, or profits. And it found that Hoyt's study was more thorough than others.

The district court also explained its refusal to credit the findings of the objectors' experts. First, the court noted that these experts did not testify, thus, denying the court an opportunity to obeserve them and judge their credibility. Second, the objectors' experts lacked Dr. Hoyt's familiarity with the industry. Third, the model of one of the experts, upon whom the others relied, assumed that the conspiracy continued into 1978 and utilized an "after" comparison period that was characterized by atypical prices and abbreviated length. Having found the methodology and assumptions of the objectors' experts flawed, the district court corrected those flaws and found that the damage estimate of those experts was not inconsistent with Dr. Hoyt's damage estimate.

[1] Our role in reviewing the district court's reliance on Dr. Hoyt's expert testimony is limited. "The competency and qualifications required of expert witnesses is a matter committed to the broad discretion of the trial judge . . . When it sits without a jury, the trial court's discretion is also the sole determinant of the weight to be given expert testimony." *Ludlow Corp.* v. *Textile Rubber & Chemical Co.*, 636 F. 2d 1057, 1060 (5th Cir. 1981). "[A]ppellate courts must rely

heavily upon the findings and credibility choices made by trial courts. Otherwise, we would be thrust into the position of reconsidering credibility and resolving conflicts in expert testimony, a position that mistakes this Court's function." *Ziegler* v. *Phillips Petroleum Co.*, 483 F. 2d 858, 861 (5th Cir.), *cert. denied*, 414 U.S. 1079, 94 S. Ct. 597, 38 L. Ed. 2d 485 (1973). The district court has satisfactorily justified its reliance on Dr. Hoyt's expert study in formulating a range of possible recovery. Our review ends there.

2. *Likelihood of Prevailing at Trial*

[2] The district court entered detailed findings and conclusions on the ability of the plaintiffs to prevail on the merits at trial. The additional findings were gleaned from materials presented to the court, the discovery proceedings, the presentence proceedings of the criminal defendants who pled *nolo contendere*, and the trial of the other criminal defendants. The presentence reports on the defendants who pled *nolo contendere* contained the government's assessment of the relative culpability of each defendant. They were placed under seal by the district court. The district court's particularlized assessment of the chances that the class would prevail against each defendant was also sealed. Since the findings and conclusions publicly articulated by the district court satisfy our limited remand instructions and provide the basis for affirmance independent of the sealed material and assessment, the sealed matters do not affect the substantial rights of the parties. Fed.R.Civ.P. 61. The objectors' assertion that this procedure compromises their due process rights fails to present a reversible error.

a. Proof of Violation. While there is strong evidence that some employees and some companies violated the Sherman Act, the defendants dispute this and the jury acquitted all of those tried for violating the criminal provisions of that Act. There is little or no evidence regarding a conspiracy in some parts of the country. Furthermore, there are several characteristics of the industry that would render a nation-wide price-

fixing conspiracy unlikely or even impossible: the industry is highly fragmented, the highest market share of any one company being 6.3%; a great deal of competition exists among sellers; and new companies enter the business with frequency and ease. In connection with the plaintiffs' ability to prove their case, the district court noted two additional factors. First, the plaintiff class would have significant problems obtaining evidence, particularly in light of the fact that many industry employees would invoke their fifth amendment privileges. Second, the defense counsel in the case are experienced and outstanding antitrust litigators, while plaintiffs' counsel, though competent, are relatively inexperienced. The district court concluded that the defendants raised issues of fact that "would allow a jury to find against plaintiffs."

b. Proof of Impact. The district court found that it would be a "close question" as to whether the alleged violations had a class-wide impact because of the evidence of substantial local control over pricing.

c. Proof of Damages. The district court noted that proof of damages would present "serious problems" since there was some evidence that the real price of corrugated materials declined during the alleged conspiracy and that the corrugated industry is characterized by low profits.

[3] d. Summary. The district court judge, in addition to his discussion of the general difficulties the plaintiffs would face in proving their case, assessed the plaintiffs' liklihood of prevailing against each individual defendant. We reject the objectors' argument that those assessments are too amorphous. A district court need not establish the plaintiffs' likelihood of prevailing to a certainty. 643 F.2d at 212. The findings of the district court are clear enough to support its exercise of discretion to approve the settlements.

3. *Exercise of Discretion*

[4] In our remand, we instructed the district court to take into account the range of possible recovery and the plaintiffs'

likelihood of prevailing at trial before exercising its discretion in passing on the fairness, reasonableness, and adequacy of the settlements. We also suggested that the court articulate why it attached significance to a number of factors. Finally, we asked the district court to pass on the reasonableness of each individual settlement or, in the alternative, to explain why it was proper to judge them collectively.

The district court satisfactorily explained its reliance on various other factors. It found that, in general, class members support the settlements. Of the more than 200,000 class members, only 210 opted out. The parties objecting to the settlements are both qualitatively and quantitatively insignificant: they do not include a major corporation and several appear to be commonly owned. The district court also ascribed importance to the fact that the settlements would permit the avoidance of an expensive, lengthy, and complex trial. The court noted that the trial against the settling defendants would last for many months, perhaps years. The complexity of an anti-trust jury trial of thirty-seven defendants gives rise to the very real possibility that the plaintiffs' case could be prejudiced. As for the expenses, they are to be measured not only in the court costs and legal fees, but also in the loss of time and services of executives and employees involved in preparing the case for trial or testifying at trial. The settlements also avoided additional costly discovery.

The district court cited four other factors that indicated the settlements should be approved. First, the court noted that the immediate payment of the settlements by the defendants vitiated any advantage to them of avoiding litigation and significantly benefitted the class since those payments are bearing interest. Second, the settlements reduced complexity of and enhanced the class' case against the non-settling defendants. Third, the settlement agreements contained cooperation clauses that proved to be helpful to the class in estimating damages, discovering evidence, and proceeding against the

non-settling defendants. Fourth, the settlements specifically reserved the plaintiffs' right to recover from the non-settling defendants the entire amount of damages caused by the conspiracy, less the amounts recovered in the settlements.[3]

Having weighed the plaintiffs' range of possible recovery and likelihood of prevailing at trial, and taken the additional factors noted above into consideration, the district court concluded that the settlements evaluated collectively are fair, reasonable, and adequate. The district court also explained why it was proper for it to evaluate the settlements collectively. Nonetheless, the district court undertook individual evaluations of the settlements and likewise concluded that each was fair, reasonable, and adequate.

In its detailed analysis of the individual settlements, the district court, in addition to the factors discussed above, considered: the amount of each settlement in total dollars and dollars per percentage point of the defendant's market share; when the settlement was negotiated; whether the defendant or its employees had been indicted or named a co-conspirator; whether indictments were for misdemeanors or felonies and how those indicted pleaded; whether the case against the defendant was strong; how the settlement fit into the plaintiffs' settlement strategy; the defendant's ability to pay; whether the settlement was reached before class certification or at the point when a mandamus action sought decertification; how the settlement dealt with the so-called *Illinois Brick* legislation[4] that would

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[3] Amicus, The Mead Corporation, a non-settling defendant that was found by a civil jury to have participated in a price-fixing conspiracy, argues that we cannot approve the settlements without imposing some form of claim reduction that will insulate it from joint and several liability. Mead's understandable concern at the prospect of such massive liability is simply irrelevant to the fairness, reasonableness, and adequacy of the settlement agreements to which Mead is not a party. Mead's arguments are best left to another day and another forum.

[4] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52

(Footnote continued on following page)

have reduced plaintiffs' recoverable damages; whether the expense of litigating against a minor defendant was justified by the potential recovery; and what non-monetary benefits the settlement provided.

We affirm the district court's findings and conclusions with respect to the fairness, reasonableness, and adequacy of the settlement agreements.[5]

C. *Reasonableness of the Allocation Formula*

[5] In light of the district court's conclusion that post-1972 claims have greater merit than pre-1973 claims, our limited remand called upon the district court to justify its approval of the allocation formula of the pre-January 5, 1979 settlement agreements which treated pre-1973 and post-1972 claims on a par. 643 F.2d at 218-20. The district court responded by offering several reasons why the distribution provisions are fair and reasonable.

First, the district court noted that some compensation should be provided for the pre-1973 purchases because all of the settlements contain a provision releasing claims for that period. Second, the claims submitted confirm the fact that most class members made purchases during both the pre-1973 and post-1972 periods. Third, the relative value of pre-1973 claims will be reduced because claims based upon undocumented estimates will be discounted and the pre-1973 period will

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(Footnote continued from preceding page)

L.Ed.2d 707 (1977), held that only direct purchasers could suffer injuries cognizable under § 4 of the Clayton Act. The so-called *Illinois Brick* legislation would have permitted reduction of damages recoverable by direct purchasers to the extent that overcharges had been passed on to indirect purchasers.

[5] The district court also relied on an assessment of relative culpability contained in the presentence reports of each defendant who pleaded *nolo contendere*. We do not consider that factor in our affirmance.

contain a higher percentage of such claims; there will be a smaller volume of claims for the pre-1973 period; and because of inflation, the pre-1973 claims will be of relatively less value. Fourth, devising and implementing a distribution formula weighting the value of pre-1973 and post-1972 claims would be costly, complex, and burdensome.

The district court did not abuse its discretion in approving the plan for allocating the pre-January 5, 1979 settlement proceeds. Indeed, in our remand we intimated that if the district court found that most plaintiffs had claims for the pre-1973 and post-1972 periods and that the costs of executing an alternative distribution formula would be substantial then the share-and-share-alike formula would be appropriate. 643 F.2d at 220. The district court so found and, moreover, supplemented those findings with additional justifications. The plan approved by the district court does not cause an inequity to any one plaintiff. It is approved.

III. *Distribution of the Settlement Proceeds*

When we first considered the district court's approval of the settlement agreement and allocation formula, the defendants argued that approval of the settlements and distribution of the proceeds should be deferred pending resolution of the rights to contribution of any non-settling defendants. *Id.* at 224-25. Such a right to contribution would have given rise to claims of a right to rescind by the settling defendants.

These issues have been mooted by the Supreme Court's intervening decision in *Texas Industries, Inc.*, v. *Radcliff Materials, Inc.*, U.S. , 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981), which holds that a federal antitrust defendant has no right to contribution from his co-conspirators. Thus, this obstacle to the implementation of the settlement agreements has been effectively removed.

IV. *Conclusion*

The district court has determined that the settlement agreements are collectively and individually fair, reasonable, and adequate. We have now been able to review that court's exercise of its discretion in light of its additional findings of fact and conclusions of law. The approval of both the settlements and the distribution plan was well within that discretion's bounds. Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

Southern District of Texas

Houston Division

United States of America v. International Paper Company; Alton Box Board Company; Consolidated Packaging Corporation; The Continental Group, Inc.; Hoerner Waldorf Corporation; The Mead Corporation; Olinkraft, Inc.; Weyerhaeuser Company; Mark Cassidy; Peter J. Fluge; Byron J. Glaser; Frederick E. Huff; J. W. Mesman; Lee F. Michael; James K. Peterson; Clarke D. Thornton; and William R. Winters, *Defendants.*	Criminal Action No. (15 U.S.C. § 1) Filed:

INDICTMENT

The Grand Jury charges:

I

THE DEFENDANTS

1. Each of the corporations named below in this paragraph is hereby indicted and made a defendant herein. Each of said defendants is incorporated and exists under the laws of the state listed opposite its name, with its principal place of business in the city listed. During all or part of the period of time covered by this indictment, each of said corporations engaged in the business of manufacturing and selling corrugated con-

tainers and corrugated sheets in the continental United States, east of the Rocky Mountain Range.

Name of Corporation	State of Incorporation	Principal Place of Business
International Paper Company	New York	New York, NY
Alton Box Board Company	Delaware	Alton, IL
Consolidated Packaging Corporation	Michigan	Chicago, IL
The Continental Group, Inc.	New York	Greenwich, CT
Hoerner Waldorf Corporation	Delaware	St. Paul, MN
The Mead Corporation	Ohio	Cincinnati, OH
Olinkraft, Inc.	Delaware	West Monroe, LA
Owens-Illinois, Inc.	Ohio	Toledo, OH
Weyerhaeuser Company	Washington	Tacoma, WA

2. In February 1977, during the pendency of the Federal Grand Jury which returned this indictment, defendant Hoerner Waldorf Corporation was merged into Champion International Corporation and was dissolved.

3. Each of the individuals named below in this paragraph is hereby indicted and made a defendant herein. Each of said defendants, during all or part of the period of time covered by the indictment, has been associated with the designated defendant corporation in the capacity indicated.

Name of Defendant	Corporation	Position
Mark Cassidy	Weyerhaeuser Company	Plant General Manager Closter, NJ
Peter J. Fluge	Owens-Illinois, Inc.	Vice President and General Manager—Forest Products Division
Byron J. Glaser	Owens-Illinois, Inc.	General Manager National Accounts Moonachie, NJ
Frederick E. Huff	Weyerhaeuser Company	Plant Sales Manager Closter, NJ
J. W. Mesman	Olinkraft, Inc.	Plant General Manager New Orleans, LA
Lee F. Michael	Olinkraft, Inc.	Plant General Manager Owosso, MI
James K. Peterson	The Continental Group, Inc.	Vice President and Division General Manager
Clarke D. Thornton	Alton Box Board Company	Regional Manager South-Central Region
William R. Winters	Owens-Illinois, Inc.	Regional Manager Northern Division

II

CO-CONSPIRATORS

4. Various corporations and individuals not made defendants in this indictment participated as co-conspirators with the defendants in the offense charged herein, and performed acts and made statements in furtherance thereof.

III

TRADE AND COMMERCE

5. Corrugated containers are made from that category of paperboard referred to as containerboard. Containerboard and corrugated sheets consist of an inner fluted sheet, the corrugating medium, glued between two liners of flat facings. In the manufacture of corrugated containers, containerboard is printed, scored creased and die-cut. Joints are fastened by stitching with wire, by taping with gummed tape or by gluing. Generally corrugated containers are shipped to the customer in a knocked-down state and are then set up by the user. Corrugated containers are manufactured in a large number of sizes and shapes and are tested for degree of strengths, weights and resistance to liquid and temperature.

6. Corrugated containers are used as shipping containers by a wide variety of industries because they are strong, lightweight and relatively inexpensive. Corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Buyers of corrugated containers include, among others, processors of food and beverage products and manufacturers of paper and printed materials, glass and ceramic products, metals and machinery, chemicals, paints, drugs, soaps and cosmetics, appliances and electrical equipment, clothing textiles and leather, rubber and plastic, furniture and wood, and transportation equipment.

7. During all or part of the period of time covered by this indictment, corrugated containers and corrugated sheets were sold by the defendant corporations in the continental United States, east of the Rocky Mountain Range. The defendant corporations have accounted for a substantial total of such sales of corrugated containers and corrugated sheets, with sales among them of approximately $1.4 billion in 1974.

8. During the period of time covered by this indictment:

(a) the defendant corporations and co-conspirators sold substantial quantities of corrugated containers and corrugated sheets in the continental United States, east of the Rocky Mountain Range, which were shipped in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which such corrugated containers and corrugated sheets were manufactured;

(b) substantial quantities of the materials used by the defendant corporations and co-conspirators in the manufacture of corrugated containers and corrugated sheets regularly moved in interstate commerce from their source to states where corrugated container and corrugated sheet manufacturing facilities are located; and

(c) the sale and shipment of corrugated containers and corrugated sheets to customers in interstate commerce and the purchase and shipment in interstate commerce of materials used in the manufacture of corrugated containers and corrugated sheets were substantially affected by the combination and conspiracy charged in this indictment.

IV

OFFENSE CHARGED

9. Beginning sometime prior to 1960, the exact date being unknown to the Grand Jury, and continuing thereafter until the

date of the return of this indictment, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1).

10. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the prices of corrugated containers and corrugated sheets.

11. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) disclosed to other members of the conspiracy prices charged or quoted or the price to be charged or quoted to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(b) received from other members of the conspiracy prices charged or quoted or the price to be charged or quoted to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(c) submitted noncompetitive bids or quotations or no bids or quotations to buyers of corrugated containers and corrugated sheets; and

(d) took steps to enforce compliance with the aforesaid combination and conspiracy.

V

EFFECTS

12. The aforesaid combination and conspiracy has had the following effects, among others:

(a) various buyers of corrugated containers and corrugated sheets have been deprived of free and open competition in the purchase of corrugated containers and corrugated sheets; and

(b) competition in the sale of corrugated containers and corrugated sheets among the defendants and co-conspirators has been restrained.

VI

JURISDICTION AND VENUE

13. The aforesaid combination and conspiracy has been carried out in part within the Southern District of Texas within the five years preceding the return of this indictment.

Dated:

A TRUE BILL

J. ALBERT KROEMER
J. Albert Kroemer

Foreman

HUGH P. MORRISON, JR.
Hugh P. Morrison, Jr.
Deputy Assistant Attorney General

LAURENCE K. GUSTAFSON
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IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

In re Corrugated Container Antitrust Litigation This Document Relates to: All Actions Except Those Identified on Exhibit II Hereto As Not Included	M.D.L. NO. 310

UNIFIED AND CONSOLIDATED COMPLAINT CLASS ACTIONS FOR VIOLATIONS OF ANTITRUST LAWS JURY TRIAL DEMANDED

UNIFIED AND CONSOLIDATED COMPLAINT

1. This Unified and Consolidated Complaint ("this Complaint") is filed pursuant to the Order of the above-entitled Court ("the Court") filed on March 2, 1978. This Complaint amends each of the complaints in the actions filed by the plaintiffs identified in Exhibit I hereto.

JURISDICTION

2. This litigation arises under Section 1 of the Sherman Act, 15 U.S.C. § 1.

3. The Court has jurisdiction of this litigation under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, and under 28 U.S.C. § 1337.

VENUE

4. Each defendant maintains an office or plant, transacts business, is found, or has an agent within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The claims alleged herein against each defendant arose in the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts. The interstate trade and commerce involved and affected by the violations alleged herein were, at all times material hereto, and are now, carried on, in part, within the Southern District of Texas, or in such other district or districts wherein any action was commenced against such defendant and thereafter transferred to the Court pursuant to 28 U.S.C. § 1407, or in all of said districts.

5. The Southern District of Texas is the proper forum for the conduct of pre-trial proceedings in this litigation pursuant to 28 U.S.C. § 1407, and the Opinion and Order of the Judicial Panel on Multidistrict Litigation, dated November 29, 1977. *In re Corrugated Container Anti-trust Litigation*, 441 F. Supp. 921 (J.P.M.D.L. 1977).

PARTIES

6. The names of the plaintiffs are set forth in Exhibit I hereto, which is incorporated herein by this reference.

7. Each of the plaintiffs purchased corrugated containers or corrugated sheets, or both corrugated containers and corrugated sheets, from one or more of the defendants, or subsidiaries or affiliates of the defendants, during the period of time covered by this Complaint.

8. Each of the corporations named in this paragraph 8 is made a defendant herein. The corporate defendants and their respective states of incorporation and principal places of busi-

ness are listed below. During all or part of the period of time covered by this Complaint, each of the corporate defendants engaged in the business of manufacturing and selling corrugated containers or corrugated sheets, or both, in the United States.

Name of Corporate Defendant	State of Incorporation	Principal Place of Business
Alton Box Board Company	Delaware	Alton, Illinois
Boise Cascade Corporation	Delaware	Boise, Idaho
Champion International, Inc.	New York	Stamford, Connecticut
The Chesapeake Corporation of Virginia	Virginia	West Point, Va.
Consolidated Packaging Corporation	Michigan	Chicago, Illinois
Container Corporation of America	Delaware	Chicago, Illinois
The Continental Group, Inc.	New York	New York, N.Y.
Corco, Inc.	Ohio	Worthington, Ohio
Crown-Zellerbach Corporation	Nevada	San Francisco, Cal.
Diamond International Corporation	Delaware	New York, N.Y.
Dura-Containers, Inc.	Delaware	Indianapolis, Ind.
Fibreboard Corporation	Delaware	San Francisco, Ca.
Georgia-Pacific Corporation	Georgia	Portland, Oregon
Green Bay Packaging, Inc.	Wisconsin	Green Bay, Wis.
Hoerner Waldorf Corporation	Delaware	St. Paul, Minn.
Inland Container Corporation	Indiana	Indianapolis, Ind.
International Paper Company	New York	New York, N.Y.
Interstate Container Corporation	New York	New York, N.Y.
Longview Fibre Company	Delaware	Longview, West Va.
MacMillan Bloedel, Inc.	Alabama	Stamford, Conn.
MacMillan Bloedel Containers, Inc.	Delaware	Chicago, Illinois
The Mead Corporation	Ohio	Dayton, Ohio
Menasha Corporation	Wisconsin	Neenah, Wisconsin
Olinkraft, Inc.	Delaware	West Monroe, La.
Owens-Illinois, Inc.	Ohio	Toledo, Ohio
Packaging Corporation of America	Delaware	Evanston, Ill.
Potlatch Corporation	Delaware	San Francisco, Cal.
St. Joe Paper Company	Florida	Jacksonville, Fla.
St. Regis Paper Company	New York	New York, N.Y.
Southwest Forest Industries, Inc.	Nevada	Phoenix, Arizona
Stone Container Corporation	Illinois	Chicago, Illinois
Union Camp Corporation	Virginia	Wayne, New Jersey
U.S. Corrugated Fibrebox Co.	Indiana	Indianapolis, Ind.
Western Kraft East, Inc.	Oregon	Bellmawr, New Jersey
Westvaco Corporation	Delaware	New York, N.Y.
Weyerhaeuser	Washington	Tacoma, Washington
Willamette Industries	Oregon	Portland, Oregon

9. Within the period of time covered by this Complaint, defendant The Continental Group, Inc. was also known as "Continental Can Company, Inc."

10. Defendant Hoerner Waldorf Corporation has merged into defendant Champion International, Inc.; and defendant Champion International, Inc. has thereby assumed, among other things, all of the liabilities of defendant Hoerner Waldorf Corporation to plaintiffs and the class arising out of the violations alleged herein.

11. The Fibre Box Association, an unincorporated association, with its principal offices located in Chicago, Illinois, is also made a defendant herein. During all or part of the period covered by this Complaint, said defendant held meetings of various committees and maintained a statistical reporting system which was used or usable by defendants in furtherance of the combination and conspiracy alleged herein.

CO-CONSPIRATORS

12. Various corporations and individuals not made defendants in this Complaint participated as co-conspirators with the defendants in the violation alleged herein, and performed acts and made statements in furtherance thereof.

CLASS ACTION ALLEGATIONS

13. Plaintiffs, by their attorneys, bring these actions for injunctive relief and for treble damages due to defendants' violations of the antitrust laws as class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent

corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960, to January 25, 1978. As used herein, the term "independent corrugated box manufacturers" means and refers to all persons who owned or controlled one or more plants which manufactured containerboard from Kraft liner board and corrugated containers from such containerboard, but who did not manufacture Kraft liner board.

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the class.

(c) The claims of the plaintiffs are typical of the claims of the class.

(d) The plaintiffs will fairly and adequately protect the interests of the class.

(e) The defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

(f) Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

The members of the class, including plaintiffs, purchased or paid for corrugated containers or corrugated sheets during the class period and sustained damages as a result of the combination and conspiracy alleged herein.

14. Corrugated containers are made from that category of paperboard referred to as containerboard. Containerboard and corrugated sheets consist of an in ıer fluted sheet, the corrugating medium, glued between two liners of flat facings. In the manufacture of corrugated containers, containerboard is printed, scored, creased and die-cut. Joints are fastened by stitching with wire, by taping with gummed tape, or by gluing. Generally, corrugated containers are shipped to the customer in a knocked-down state and are then set up by the user. Corrugated containers are manufactured in a large number of sizes and shapes and are tested for degree of strengths, weights, and resistance to liquid and temperature.

15. Corrugated containers are used as shipping containers by a wide variety of industries because they are strong, lightweight, and relatively inexpensive. Corrugated containers accounted for approximately 18 percent of all packaging sales in 1975. Buyers of corrugated containers include, among others, processors of food and beverage products and manufacturers of paper and printed materials, glass and ceramic products, metals and machinery, chemicals, paints, drugs, soaps and cosmetics, appliances and electrical equipment, clothing textiles and leather, rubber and plastic, furniture and wood, and transportation equipment.

16. During all or part of the period of time covered by this Complaint, corrugated containers and corrugated sheets were sold by the defendant corporations in the United States.

17. During the period of time covered by this Complaint:

(a) The defendant corporations and co-conspirators sold substantial quantities of corrugated containers and corrugated sheets in the United States, which were shipped in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which such corrugated containers and corrugated sheets were manufactured;

(b) Substantial quantities of the materials used by the defendant corporations and co-conspirators in the manufacture of corrugated containers and corrugated sheets regularly moved in interstate commerce from their source to states where corrugated container and corrugated sheet manufacturing facilities are located; and

(c) The sale and shipment of corrugated containers and corrugated sheets to customers in interstate commerce and the purchase and shipment in interstate commerce of materials used in the manufacture of corrugated containers and corrugated sheets were substantially affected by the combination and conspiracy alleged in this Complaint.

VIOLATION ALLEGED

18. Beginning sometime prior to 1960, the exact date being unknown to the plaintiffs, and continuing thereafter until January 25, 1978, there has been a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise, maintain, and stabilize the prices of corrugated containers and corrugated sheets.

20. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) Disclosed to other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(b) Received from other members of the conspiracy prices charged or quoted, or the price to be charged or quoted, to buyers of corrugated containers and corrugated sheets, as well as other information relevant to the pricing of corrugated containers and corrugated sheets;

(c) Submitted non-competitive bids or quotations or no bids or quotations to buyers of corrugated containers and corrugated sheets;

(d) Agreed with other members of the conspiracy upon increases in prices of corrugated containers and corrugated sheets; and

(e) Took steps to enforce compliance with the aforesaid combination and conspiracy.

EFFECTS

21. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Purchasers of corrugated containers and corrugated sheets have been deprived of free and open competition in the purchase of corrugated containers and corrugated sheets; and

(b) Competition in the sale of corrugated containers and corrugated sheets among the defendants and co-conspirators has been restrained and prices of corrugated containers and corrugated sheets have been raised to, and fixed, maintained, and stabilized at artificial and non-competitive levels.

FRAUDULENT CONCEALMENT

22. Until on or after March 21, 1977, plaintiffs and the members of the class had no knowledge of any of the violation of the antitrust laws alleged herein, or of any facts which might

have led to the discovery thereof. Plaintiffs and the members of the class could not have uncovered any of the violations at any time prior to March 21, 1977, by the exercise of due diligence inasmuch as the unlawful conspiracy was fraudulently concealed by the defendants, who resorted to secrecy to avoid detection of the conspiracy.

INJURY TO PLAINTIFFS

23. During and throughout the period of the aforesaid combination and conspiracy, plaintiffs and the members of the class purchased substantial quantities of corrugated containers and corrugated sheets from one or more of the defendants. By reason of the aforesaid combination and conspiracy, those purchases were made at prices higher than the prices which plaintiffs and the members of the class would have paid in the absence of any such combination or conspiracy.

24. As a result of the aforesaid combination and conspiracy, plaintiffs and the class have sustained substantial losses and damages to their business and property in an amount which is presently undetermined.

PRAYER FOR RELIEF

25. WHEREFORE, plaintiffs pray for judgment against defendants, jointly and severally, and in favor of plaintiffs and the class, as follows:

(a) That the aforesaid combination and conspiracy and the acts done in furtherance thereof by defendants be adjudged to have been in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

(b) That plaintiffs and the other members of the class recover threefold the damages determined to have been sustained by each of them respectively as a result of the conduct of the defendants complained of herein, and that joint and several judgment be entered against defendants, and each of them, for the amount so determined.

(c) That defendants and all other persons acting on their behalf or in concert with them be perpetually enjoined and restrained from conducting, maintaining, renewing, or carrying on the aforesaid combination and conspiracy or any other combination or conspiracy having a similar purpose or effect in restraining competition in the sale of corrugated containers or corrugated sheets.

(d) That plaintiffs recover from the defendants the cost of this suit and reasonable attorneys' fees in accordance with the federal antitrust laws.

(e) That plaintiffs and the class have such other and further relief as the Court may deem just and proper.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002
(713) 228-1521

DOUGHERTY, RUMBLE & BUTLER
Vance K. Opperman
Vice Chairman, Plaintiffs' Steering Committee
1500 First National Bank Building
St. Paul, Minnesota 55101
(612) 291-9333

By: /s/ Stephen D. Susman
Stephen D. Susman
On Behalf of Plaintiffs' Steering Committee and all Plaintiffs Identified In Exhibit I Hereto as Included

JURY DEMANDED

Plaintiffs demand trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs' Steering Committee
806 Main Street, 21st Floor
Houston, Texas 77002
(713) 228-1521

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By: /s/ Stephen D. Susman
Stephen D. Susman
On Behalf of Plaintiffs' Steering Committee and all Plaintiffs Identified in Exhibit I Hereto as Included

EXHIBIT I

PLAINTIFFS AND CIVIL ACTIONS INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

Plaintiffs	Civil Action Docket Numbers	Comments
1. Adams Extract Co.	77-H-461	Plaintiff Commonwealth Toy & Novelty Co., Inc. to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
2. After Six, Incorporated	H-77-805	
Bert Paley, Ltd.		
3. The Amberley Greeting Card Company	H-78-56	
The Al Barker Publishing Co.		
Mr. B. Greeting Card Co., Inc.		
4. Andre-Boudin Bakeries, Inc.	H-78-53	
5. Arcadia Furniture Corporation	H-77-790	
6. Artcraft Press, Inc.	H-77-2147	
7. Austin Products Co.	H-77-782	
8. Bodines, Inc.	H-78-64	
9. The Beaumont Company	H-78-11	
10. Carron Manufacturing Company	H-78-60	
11. Co-ordinated Industries, Inc.	H-78-58	
12. Covington Fabrics Corp.	H-78-10	
13. Denver Meat Company	H-77-1934	
14. Doranne of California, Inc., d/b/a Embassy Giftwares	77-H-724	
15. Douglas Furniture Corp.	H-78-54	
16. Durawood Industries, Inc.	H-78-62	
17. Erie Seating Co.	H-78-68	
Rossville Packing Co.		
18. Furniture Plastics, Inc.	H-78-59	
19. Grist Mill Co.	H-77-849	
20. Haeger Potteries, Inc.	H-77-1457	
Macomb Pottery Co., Inc.		
21. Land O'Lakes, Inc.	H-78-170	
22. Levee Furniture Company	H-77-793	

Plaintiffs	Civil Action Docket Numbers	Comments
23. Northland Aluminum Products, Inc.	H-78-171	
24. Marathon Enterprises, Inc. District Hotel Supply, Inc. Jefferson Orchards, Inc.	H-77-584	Plaintiff Pepsi-Cola Bottling Co. of Washington, D.C., Inc., to be dropped pursuant to Federal Rules of Civil Procedure 15 and 21.
25. Red Wing Industries, Inc.	H-77-804	
26. Salsburg Meats, Inc.	H-78-67	
27. Sambo's Restaurants, Inc.	H-78-63	
28. Scranton Royal Crown Bottling Co. Carl and Wallace Eisenstat, t/a Scranton Pepsi-Cola Bottling Co. I. Kaplan, Inc. Mid-Valley Packing Co., Inc. Golden Quality Ice Cream Co. Atlas Container Co., Inc.	78-375	Presently pending in E.D., but expected to be transferred to this Court as a tag-along action, pursuant to Rule 9 of Jud. P. on Mult. D. Lit.
29. Shell-Tex Fisheries, Ltd.	H-77-876	
30. Snyder-Craft Co., Inc.	H-78-65	
31. Tierra Royal Potteries, Inc. Continental Nut Co.	H-77-2168	Plaintiff Continental Nut Co. is hereby added pursuant to Federal Rules of Civil Procedure 15 and 21.
32. Town House Furniture Ltd. Penthouse Furniture Ltd.	H-78-69	
33. Universal Cooperatives, Inc.	H-77-885	
34. Valley Avocado Sales, Inc.	H-77-869	
35. Valley Plastics, Inc.	H-77-792	
36. West Publishing Company	H-77-791	
37. Westside Paper Company	H-78-48	
38. Williams Manufacturing Company Seneca Industries, Inc.	H-77-789	
39. Winona Industries, Inc.	H-77-814	
40. Wittek Golf Supply Co., Inc.	H-78-55	

EXHIBIT II

PLAINTIFFS AND CIVIL ACTIONS NOT INCLUDED WITHIN THIS UNIFIED AND CONSOLIDATED COMPLAINT

A. The Following Class Actions Are to be Dismissed Voluntarily Pursuant to Federal Rule of Civil Procedure 41(a):

Plaintiffs	Houston Civil Action Docket Numbers
1. Carnivale Bag Co., Inc.	H-78-61
2. Pepco Industries, Inc.	H-77-813
3. Steve Matson Products, Inc.	H-77-1991
4. Veneer Distributors, Inc.	H-78-66
5. Westbrae Natural Foods, Inc.	H-78-57

B. Non-Class-Actions Not Included:

Plaintiffs	Houston Civil Action Docket Numbers
1. ITT Continental Baking Company Pearson Candy Company The Paniplus Company ITT Gwaltney, Inc.	H-78-36
2. United Farmers Cooperative, Inc. Bookout & Mitchell Supply, Inc. Valley Farms, Inc. Griffin & Brand Sales Agency, Inc. Gateway Farms, Inc. International Frozen Foods, Inc.	H-77-2158
3. United Foods, Inc. John Inglis Frozen Foods Company Winter Garden, Inc. Dulany Foods, Inc. Nutritional Food Products, Inc. United Food Services, Inc. Trappe Frozen Foods Corporation	H-78-4

CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiffs' Unified and Consolidated Complaint (including Exhibits I and II) was this 20th day of March, 1978, served upon Defendants' Liaison Counsel and the Secretary of Defendants' Coordinating Committee by hand delivery to each and upon each attorney-in-charge designated in defendants' effective service list by depositing copies in the United States mail.

/s/ Stephen D. Susman
Stephen D. Susman

STATE OF MICHIGAN
COUNTY OF KENT } ss.:

AFFIDAVIT OF JAMES L. KOWALL

JAMES L. KOWALL, having been first duly worn, on oath states as follows:

1. I am now, and have been since its incorporation in March 1970, the majority shareholder and president of plaintiff Great Northern Packaging Corp. I am now, and have been since its incorporation in April 1975, the sole shareholder and president of plaintiff Huron Packaging Corp.

2. I have been employed and engaged in the corrugated container industry continuously for the past twenty-five years.

3. From 1953 to 1966 I was a salesman of corrugated containers for various companies, including, from 1965 to 1966, approximately one year as the sales manager for the Western Michigan area for Consolidated Packaging Corp. I founded Grand Rapids Creative Packaging Co., a sole proprietorship, in October 1966, which was incorporated on January 28, 1967 under the name Grand Rapids Packaging Corp. I was a shareholder and managing officer of that company until January 1970. That company was an independent converter of corrugated containers and it also operated a corrugating plant which I managed. In March 1970 I incorporated plaintiff Great Northern Packaging Corp., which has done business as an independent converter of corrugated containers from March 1970 to the present. On April 24, 1975 I incorporated plaintiff Huron Packaging Corp. which, under my management, did business as an independent converter of corrugated containers until April 30, 1977.

4. I was the principal founder of the Executive Society of Corrugated Sheet Converters, which commenced in July 1972 as an association of independent converters of corrugated containers in Indiana and Michigan.

5. I was the principal founder of the Association of Independent Corrugated Converters (AICC), which commenced in November 1974. AICC is an international trade association of independent corrugated container companies, which was formed in an attempt to correct antitrust and other abuses in the corrugated container industry. I served as its first president from November 1974 to November 1975 and I served as a member of the board of directors from November 1974 to November 1976. I have been and am now chairman of several of its committees.

6. There are three principal functional levels within the corrugated container industry, viz: (a) manufacture of liner board and medium (containerboard), (b) fabricating corrugated sheets, and (c) manufacture of corrugated containers and corrugated material for use in and with the containers.

7. The companies which engage in the fabrication of corrugated sheets are called "corrugaters" or "combiners" (item (b) above). This process essentially involves the combination (with adhesives) of liner board and medium. Corrugaters either sell the sheets to independent converters or use the sheets for conversion into containers (item (c) above), or both. Some corrugaters sell corrugated sheets to independent converters. Some companies only convert sheets into containers and associated products; these companies purchase all of their sheets from corrugaters.

8. The companies which perform all three functions are known as "integrated" companies. That is, the integrated companies (a) manufacture liner board and medium, (b) produce corrugated sheets, and (c) convert the sheets into containers. Liner board and medium are called "containerboard."*

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* I am informed that one of the briefs filed in this case recites: "... all persons who ... manufactured containerboard from Kraft liner board...." This is an incorrect and misleading description. Inasmuch as Kraft liner board *is* containerboard, no one manufactures containerboard *from* Kraft liner board. (See *Fibre Box Handbook*, p. 19, a copy of which is attached hereto)

9. A "sheet plant," as that term is commonly used in the industry, is a facility which converts corrugated sheets into containers. A sheet plant purchases corrugated sheets from corrugaters. The term "sheet plant" ordinarily denotes a facility which neither manufactures containerboard nor produces corrugated sheets. A sheet plant purchases sheets from either an integrated company or from an independent corrugater.

10. A sheet plant's customers buy corrugated containers from the sheet plant. Also, some purchasers of containers purchase fillers, pads, die-cut forms or assembled partitions for use in or with those containers. In those instances, the sheet plant cuts sheets to size, die-cuts them, slats them and/or scores (creases) them for that use and purpose. Purchasers of containers, as such, do not buy sheets. Sheet plants buy sheets.

11. The Great Northern Packaging Corp.'s complaint alleges a price-fixing conspiracy in the sale of corrugated sheets. By its very definition, any such price-fixing conspiracy occurred at the *corrugater* level of the industry (¶ 6, item (b) above). The price-fixing concerning which the *purchasers of containers* complain occurred at the container-converter level. They involve two different products, two different sets of prices and, in some cases, different sets of wrongdoers.

12. From my knowledge and experience in the industry, I know that container-purchasers cannot adequately and properly represent sheet plants. Container-purchasers are not in the business of purchasing sheets; container-purchasers purchase their containers (and associated pads, partitions, etc.) from converters (whether integrated or independent sheet plants). Container-purchasers thus have no vital interest to serve in proving a conspiracy to fix the prices of sheets. On the other hand, the vital interest of the independent sheet plants is to prove a conspiracy to fix the prices of corrugated sheets. The sheet plants have no interest in proving a conspiracy by the integrated companies to fix the prices of containers (the finished product).

13. I am informed that a settlement agreement has been made in which St. Regis Paper Company will pay $1,700,000 in return for a complete discharge of all claims against St. Regis. St. Regis is, and was at all relevant times in the past, an integrated company which sold both corrugated sheets (to independent sheet plants) and finished containers. St. Regis' share of the corrugated sheet market was much greater than its share of the finished container market. St. Regis is one of the five largest sellers of corrugated sheets in the United States. Plaintiff Huron Packaging Corp. alone, which is only one of approximately 800 such sheet plants in the United States, in just a two-year period, purchased approximately ($987,000 of corrugated sheets from St. Regis.

/s/James L. Kowall

SUBSCRIBED AND SWORN TO before me this 10th day of October, 1978.

/s/Genevieve Campbell
Notary Public
Commission expires 11/12/1980.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

In re:

Corrugated Container Antitrust Litigation } MDL Docket No. 310

PRETRIAL HEARING

December 14, 1978

[Received December 22, 1978].

[99] MR. SUSMAN: Fine.

THE COURT: Now, the need for sheet plant subclass. Who wants to talk about that?

MR. MONTAGUE: Your Honor, if I may, I am Laddie Montague and I represent Atlas Container Company.

I think this issue has been presented to Your Honor in the papers and I think there's no discord amongst the parties, from the papers that I have read, but if I can just summarize, there really are three basic reasons why it would be—

THE COURT: You are speaking in behalf of the sheet plants?

MR. MONTAGUE: Yes, sir. Atlas Container Corporation is a named plaintiff and a sheet plant company.

THE COURT: Right.

MR. MONTAGUE: And those three areas are principally discovery, trial and settlement.

The issue of conspiracy with respect to sheet plants is somewhat [100] different than a conspiracy with respect to containers.

Now, while it would behoove the sheet class or the sheet plant to show that there was a conspiracy with respect to containers, because obviously one of the possible motives of fixing the prices of sheet plants, of sheets, is to assure the competitiveness of the defendants, assure the defendants, that their competitors who manufacture containers have to keep them at a certain price level, which would maintain the stability of the container prices.

The opposite is not true. The container plaintiffs have really no interest in determining whether or not the conspiracy also affected sheets. So someone who has a special interest in that class must be available during discovery.

The second area is impact and damages. Obviously, they are two separate categories. Whether or not the conspiracy affected the price of containers has no bearing on whether or not the conspiracy affected the price of sheets. And, again, independent counsel has to be available to look out for that particular interest.

With respect to trial, obviously, that same dichotomy would be necessary. There would have to be independent counsel to look after those particular interests.

Lastly, with respect to settlement, the settlements that have been negotiated to date involve everybody and it is contemplated, even in the order presented to the Court, that the subclass of sheet plants would operate within the whole except in those areas where an expressed conflict arose and the sheet plants had to be represented independently. That would occur in settlement, Your Honor, where there has to be an allocation of the particular funds involved. There has to be somebody independent to represent the sheet class people, the sheet class, as vis a vis the container plaintiffs, as to see who gets what share of the settlement fund. And that is going to require economic data and that is going to [102] require a determination of maybe one case is better than the others on the merits and the likelihood of success, and one is better than the other, but that one person can't act and represent both of those interests.

[102] So those are basically the reasons why there ought to be a seperate subclass represented at this time.

I might add that in light of what Mr. Jeffers said, for example, today, that the sales should not be kept in, well, I don't agree with that and I don't think there is any authority for that even assuming arguendo that he is correct. For example, with the St. Regis settlement the sheet class would have to oppose that settlement because the St. Regis' share of the sheet market is greater than their share of the container market. So that fact would have a greater impact on the sheet subclass than it might have on the container class.

That would be another example where there would have to be independent [103] counsel representing the sheet class.

THE COURT: I think there ought to be a subclass of sheet plants, myself. I have not seen anybody that really objects to it.

MR. SUSMAN: Your Honor, we have obviously worked very closely with Mr. Montague. He is, as you know, one of the designated class representatives. He has participated fully in all deliberations of the steering committee and all settlement discussions, and I think we have been able to work it out very well. He has not been excluded from anything.

We have, as the Court knows—

THE COURT: Don't you think there ought to be a subclass?

MR. SUSMAN: I don't have any problem, Your Honor, with the creation of a subclass as long as it is done under the umbrella of the major class and pursuant to the pretrial orders that the Court has entered.

THE COURT: And I would guess that to create a subclass, an adequate [104] subclass representative would be Atlas.

MR. MONTAGUE: Your Honor, may I be heard as to that? I don't want to speak against my own interests, but I want to be candid with the Court.

When this matter came up I had conferred and worked closely with Mr. Hartunian, who represents Great Northern, and we had agreed to work closely on this because, obviously, more than one attorney was going to be necessary to fully protect the sheet class, the sheet group. It is not where there are a whole bunch of law firms involved representing the sheet group. There's only two.

The second point was that my client is no longer in business. It went out of business in the early seventies. Mr. Hartunian's client, Great Northern, went into business in the early seventies. So they sort of, together, fill up the whole time gap involved in the case.

And for that reason and because we are coordinating with the steering committee, it seemed to me that it might [105] be appropriate to have two class representatives, Atlas Container and Great Northern.

THE COURT: I have no objection to that. Do you?

MR. CARRELL: Your Honor, I would just like to preserve the objections which we have previously made that the designation of the subclass will suffer the same infirmities which we have raised before this Court, indeed again before the Fifth Circuit. I think that is highlighted by this statement that I have heard that Atlas is no longer in business. Perhaps if we'd had discovery, we might have determined whether or not they were an adequate representative at an earlier date.

THE COURT: Okay, Mr. Carrell. Touché.

MR. MONTAGUE: Your Honor, that's not correct. They had that information because interrogatories were answered, I believe, which provided that information.

MR. CORINBLIT: I would like to

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

In Re: Corrugated Container Antitrust Litigation This Document Relates To: All Class Actions Except Franklin Container Corp., Et Al. (C.A. No. H-78-671)	M.D.L. NO. 310

MEMORANDUM OF SHEET CLASS REPRESENTATIVE ATLAS CONTAINER COMPANY IN OPPOSITION TO:

1. MOTION OF CERTAIN SETTLING DEFENDANTS TO MERGE THE SHEET PLANT SUBCLASS WITH THE CONTAINER PURCHASER SUBCLASS

and

2. MOTION OF DEFENDANT CCA TO DECERTIFY THE SHEET PLAN SUBCLASS

Plaintiff Atlas Container Co., on behalf of the sheet plant subclass, hereby responds to the above-listed motions *seriatim:*

I.

THE MOTION TO MERGE

Certain settling defendants now suggest that the Court erred in certifying a sheet plant subclass, on the ground that a subclass is no longer necessary. Defendants's motion misstates

the rationale for creation of the subclass. It ignores not only these defendants' own recent conflict arguments against certifying any class, and the factors which impelled the certification of this subclass, but also subsequent circumstances which make continued certification of a subclass even more important at this stage of the litigation.

Factual Background

It is more than coincidental that only the defendants who settled after January 5, 1979, have made this motion to disestablish the sheet plant subclass.[1] The sheet plant subclass is not a party to those settlement agreements. Thus, the claims of the sheet plant subclass against these defendants are still pending. Three-way negotiations have been on-going for several months with these post-January 5, 1979 settling defendants and representatives of the container subclass respectively, for the purpose of including the sheet plant subclass in those settlements. Such negotiations have from time to time included demands from the sheet plant subclass for payment of some additional settlement funds by those defendants and for certain meaningful injunctive relief. By seeking to have the sheet plant subclass and the container purchaser subclass re-united as one class, this motion attempts to circumvent those negotiations. If successful, these settling defendants apparently hope that the sheet plant subclass will be bound by the existing settlements without these defendants having to give any further consideration either in the form of monetary payments or injunctive relief.

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[1] Eleven defendants settled after January 5, 1979. Ten of those joined this motion. The eleventh, Container Corporation, alone moves to decertify the sheet plant subclass altogether. See Part II hereof, *infra*.

Argument

At the outset, we are met by the unusual spectre of class action defense counsel vigorously arguing *the absence* of conflict between members of a proposed unitary class![2] These counsel took just the opposite position as recently as last summer, in arguing that "conflicts between class members cannot be avoided" because of the inclusion of sheet plants in the class. See *Defendants' Joint Reply Memorandum In Opposition To Class Certification*, dated August 11, 1978, at p. 17 n.30.

Even assuming there were no conflict as the moving defendants now argue, certification of the two subclasses would still be appropriate. The subclass mechanism of Rule 23(c)(4)(B) exists to provide the Court with needed flexibility in the control and management of these actions. *Cf. Dorfman v. First Boston Corp.*, 62 F.R.D. 466, 476 (E.D. Pa. 1974) (subclassing promotes efficiency and manageability). This reason alone is sufficient reason for the continued existence of two subclasses, especially where different legal and factual issues may—and *do*—exist for the two subclasses. Indeed, the motion of defendant Container Corporation of America ("CCA") to decertify, which (though unmeritorious) is based upon purported, unpleaded defenses alleging wrongdoing by the members of the sheet plant subclass only, exemplifies the substantial differences in factual and legal issues between the two subclasses.

Other differences between the subclasses include the existence of conspiratorial activity directed solely at sheet plant pricing,[3] possible differences in damage theories in the event of

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[2] *Cf. Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975). The only apparent motivation for counsel's motion is to avoid further liability by requiring sheet class members to share in the post-January 5, 1979 container class settlements. See test *supra* at p. 2.

[3] See Tr. Vol. 18, pp. 95-100 (testimony of Melvin Bricker, Executive Vice-President of defendant Interstate Container Corp., concerning reaching of "consensus" on sheet prices without apparent involvement of container pricing subjects).

Congressional reversal of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977), and differences between the identities of defendants producing and selling corrugated sheet, and those selling only corrugated containers. It has repeatedly been held that the existence of particular considerations pertaining to only part of a class justifies the creation of subclasses, *even in the absence of any conflict of interest. E.g., Sirota v. Econo-Car Int'l Corp.*, 61 F.R.D. 604, 607 (S.D.N.Y. 1974); *Dorfman v. First Boston Corp., supra.*

What is more, however, is the fact that genuine divergence of interest, *i.e.*, conflict, clearly does exist between the two subclasses. That conflict existed when the motion for subclass certification was granted, and nothing has happened in the interim to alleviate it. Indeed, the moving defendants' "no-conflict" arguments bear out the absence of change. They argue the asserted joint interest of container purchaser in proving both a container conspiracy and a sheet conspiracy, an argument which was made, considered, and apparently rejected at the time subclassing was ordered by Pretrial Order No. 7.

In fact, the asserted interest of a small percentage of container purchasers in proving the sheet price conspiracy, based upon their incidental and *de minimis* purchases of sheets, does not vitiate the conflict. Container purchasers have every reason to accord proof of the sheet conspiracy far lower priority than do the sheet class representatives, especially since the container representatives have now settled their claims against many producers of sheet as to whom the sheet plant class members still have pending claims.[4] Subclasses are clearly the appropriate method of remedying this evil:

[4] Indeed, the container purchaser subclass has put discovery against these very settling defendants on the "backburner", therefore depriving the sheet plant subclass of any immediate discovery from these defendants. This is an obvious disadvantage to the sheet plant subclass.

> Absent subclassing, class representatives are likely to have to rank the interests of class members as a precondition to advocacy. The possibility emerges, therefore, that the interests of some class members will either never be represented, because regularly given low priority, or only be sporadically asserted, because of changes in the representative's priorities during the course of litigation. By dividing a class, a judge may be able to redefine the responsibilities of class attorneys and named plaintiffs in terms of the interests of distinct and relatively unified portions of a class. The necessity for the ranking of class interests by the parties may therefore diminish, and the likelihood that diverse absentee interests will be presented to the court increase[s]. *Developments In the Law—Class Actions,* 89 Harv. L. Rev. 1319, 1479 (1979) (footnote omitted).

Divergence of interest also exists because the representatives of the container class have absolutely no interest in dispelling the kinds of attacks made in the CCA Motion to Decertify.[5] An occasional purchaser of sheets in conjunction with container purchases obviously stands in a different position in the industry than one who purchases only sheets from defendants and then manufactures containers himself for sale to others, as CCA's motion makes clear. Indeed, since a container representative's fiduciary duties are first and foremost to the members of the container purchaser class, it may be that these representatives would be in breach of those duties if they undertook the litigation of the special issues which pertain only to members of the sheet plant subclass.

The moving defendants advance settlement considerations as a basis for finding no conflict. (Memorandum of Certain Settling Defendants at 5-6). Contrary to these defendants' views however, the pre-January 5, 1979 settlement allocation formulas arrived at for both subclasses do not indicate absence

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[5] It is noteworthy that the CCA motion to decertify is not aimed at alleged activities of all sheet purchasers, *but only at the activities of sheet plants.*

of conflict merely because both subclasses shared in those settlements on the same basis. That allocation was not a gift from the Plaintiffs's Steering Committee to the sheet plant subclass. To the contrary, the allocation agreed upon was the product of arms-length negotiation between members of the Steering Committee and counsel for the sheet-class representatives.

The post-January 5, 1979, settlement agreements with the container purchaser subclass cogently demonstrate that the interests of the sheet plant subclass are not adequately represented by the representatives of the container purchaser class. Therein, the sheet plant subclass is allotted an arbitrary percentage of the recovery as a maximum; the container subclass has the right to challenge any allocation at all—that is, to assert that the sheet plant subclass is entitled to nothing. Does that agreement suggest that there is no conflict between the two subclasses? Obviously, it supports the contrary conclusion—a serious conflict exists. As the Court has recognized, such conflict calls for creation of subclasses. See 80 F.R.D. at 248. Indeed, subclasses are "required" where there is a divergence of interest among members of a class. *Wetzel v. Liberty Mutual Inc. Co.*, 508 F.2d 239, 253 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975).

Finally, the existence of the sheet plant subclass has not made this case less manageable. The undersigned counsel for the sheet plant subclass has worked closely and cooperatively with the Plaintiffs' Steering Committee on liability discovery, has actively participated in successful settlement negotiations and subclass allocation negotiations, has supported the Committee's endeavors through payment of very substantial assessments, and has assisted in negotiating numerous discovery agreements and compromises entered into between the Steering Committee and counsel for the Non-Settling Defendants. Counsel for the sheet plant subclass fully expect to be able to

continue this working relationship while protecting the sheet plant subclass' differing interests with respect to damages and other issues, thus creating no further management problems due to existence of the subclass.[6]

II.

CCA'S MOTION TO DECERTIFY

The remaining post-January 5, 1979 settling defendant, Container Corp. of America ("CCA"), has advanced four ostensibly different reasons, none of them meritorious,[7] why the sheet plant subclass should be decertified. CCA's motion is based upon a fundamental misstatement of law which wholly overlooks not only the *Kiefer-Stewart* decision of the Supreme Court,[8] but also this Court's careful consideration of the law in this area in *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1126-32 (S.D. Tex. 1976), and *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 796 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973).

Factual Background

Nowhere in CCA's answer to the Unified and Consolidated Complaint is the purported defense of alleged illegal conduct by sheet plant plaintiffs pleaded. Without seeking

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[6] What is more, any special considerations pertinent to the sheet subclass would still be at issue if the classes were merged, thereby creating the same alleged management problems which exist with separate subclasses.

[7] The fact that CCA's arguments are lacking in merit so far as class decertification is concerned does not mean that no legal and factual issues unique to the sheet subclass exist. To the contrary, the very fact that these arguments are raised solely with respect to sheet plants underscores the need for separate representation of the sheet plant subclass. See Part I, *supra*.

[8] *Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc.* 340 U.S. 211 (1951).

leave to amend, which would be the proper course of procedure, CCA now asserts that "an indeterminable number of the sheet plants . . . may have been members of the alleged price-fixing conspiracy. . ." (CCA Memorandum at 3).[9]

In support of this assertion, CCA relies upon selected snippets from the criminal trial record pertaining to only two of hundreds of subclass members, one of which ("Great Northern") is a subclass representative. The reliability of this evidence is questionable at best, absent any opportunity for cross-examination thereon by sheet plant plaintiffs or their representatives, and as argued below this testimony cannot be given controlling effect in this proceeding. However, to the extent this testimony may be cognizable now, it does not show what CCA seeks to have it show. At most, there is testimony by a sheet plant officer as to price communications *with respect to container sales.* (E.g., testimony of Julius Cohn, Tr. Vol. 51, pp. 101-105).[10]

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[9] Such an amendment to defendants' answers, if moved for, would have to be denied for the reasons, *inter alia,* (1) that defendants have unduly delayed moving for such an amendment, to the prejudice of plaintiffs—obviously, if such a purported defense existed as defendants now informally allege, defendants, being members of the alleged conspiracy, would have had full knowledge of same—; and (2) that such a defense is frivolous. See *infra* at p. 12.

[10] Upon cross-examination by defendants' counsel, that same sheet plant officer also testified:

> Q. When we were talking about sheet plant prices and corrugated plant prices, am I to assume that, on the average and as a general rule, the corrugated plant prices are lower prices than the sheet plant prices?
>
> A. That's correct, sir.
>
> Q. And, to that extent, you have a difficult time competing head to head with those companies that operate a corrugator plant?
>
> A. That's true, but there's some overlapping.
>
> Q. Obviously, there is going to be some overlapping?
>
> A. Yes, sir.
>
> Q. As a general rule, you're not out soliciting the same business?

Footnote continued on following page

Argument

A. As A Matter of Law, The Asserted Participation of Sheet Plants in Container Price Exchanges Would Not Be a Defense.

Even assuming *arguendo* the existence of some price exchanges concerning *containers* by sheet plants, that fact would be no obstacle to the sheet plant plaintiffs' claims against the defendants for price-fixing of corrugated *sheet*. This was held to be the law as long ago as 1951, in *Kiefer-Stewart Co.*, v. *Jos. E. Seagram & Sons, supra.* In *Kiefer-Stewart*, the Supreme Court was faced with the identical defense of a plaintiff's alleged price-fixing of its own products. Assuming the truth of defendant's allegation, the Court nonetheless held:

> If [plaintiff] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. *The alleged illegal conduct of [plaintiffs], however, could not legalize the unlawful combination by [defendants] nor immunize them against liability to those they injured.* 340 U.S. at 214 [emphasis supplied; citations omitted].[11]

Footnote continued from preceding page

> A. I'm not out soliciting the trailerloads and carloads.
>
> Q. You're out seeking short run business, generally?
>
> A. That's correct, sir.
>
> Q. As opposed to these corrugator plants who are out seeking the long run business?
>
> A. That's right.
>
> Q. And so, to that extent, you're not a head-to-head competitor with companies like the Continental Group, Weyerhaeuser, MacMillan Bloedel and some of these other companies?
>
> A. That's correct, sir.

Id., at 116-117.

[11] *Kiefer-Stewart* thus underscores the divergence of interest between the container and sheet plant classes, since it sanctions antitrust enforcement actions by container purchasers against the container-selling sheet plants.

The clear result under *Kiefer-Stewart* is that CCA's purported illegal conduct defense is a sham, and that its motion for decertification based upon that defense is likewise unavailing.

CCA has cited neither *Kiefer-Stewart* nor its progeny to the Court. *Cf., e.g., Health Corp. of America* v. *New Jersey Dental Ass'n,* 424 F. Supp. 931, 933 (D.N.J. 1977) (plaintiffs' involvement even in same kind of anticompetitive activity as defendant is not a defense). Rather, CCA refers only to the *in pari delicto* decision of the Supreme Court in *Perma-Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 (1968). Even assuming that *in pari delicto* rather than "unclean hands-illegality" is the correct characterization of the defense CCA is now informally asserting,[12] this Court's authoritative consideration of *Perma-Life* in *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co., supra,* shows that *Perma-Life* lends no comfort to CCA's position.

In *Pearl Brewing,* this Court held that *in pari delicto* considerations not preclude proof of injury and damages caused by economically stronger defendants. See 415 F. Supp. at 1131. In fact, in *Pearl Brewing,* the Court granted plaintiff's motion to strike an *in pari delicto* defense for just this reason, *id.* at 1131-32, holding that any *in pari delicto* considerations are relevant at most to determination of damages, a matter which the Court has already held does not preclude class certification. *In re Corrugated Container Antitrust Litigation,* 80 F. R. D. 244, 248 n. 3, 249, 253 (S. D. Tex. 1978).

Under *Illinois Brick Co.* v. *Illinois, supra,* sheet plants are the only plaintiffs who can enforce the liabilities of defendants with respect to the overwhelming majority of their sales of corrugated sheet. *Illinois Brick* and *Kiefer-Stewart* together

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[12] *In pari delicto* would only be applicable if sheet plants were somehow part of a conspiracy as to sheet prices. Of course, CCA has neither pleaded nor asserted such involvement by the sheet plant plaintiffs.

create a unified enforcement scheme, pursuant to which no hiatus in private antitrust enforcement occurs even if allegations such as those made by CCA were true. Accordingly, since CCA's assertions are unavailing as a matter of law, its motion to decertify based thereon must be denied.[13]

B. CCA's Memorandum Falls Woefully Short of Showing Widespread Individual Issues Which Would Preclude Class Treatment.

While CCA's purported illegality defense lacks any legal merit and thus interjects no obstacles to sheet plant recoveries, it is also noteworthy that CCA has not even shown that its "defense" would have any general applicability to sheet subclass mmbers. Unlike CCA, no sheet plant subclass members were indicted by the government. Nor has CCA come forward with any but isolated instances of sheet plant container price exchanges. Of course if CCA had knowledge of other exchanges, it would have a duty to bring them to the Court's attention in support of its motion. The fact that it did not do so is itself powerful evidence that no such exchanges existed on a widespread basis.

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[13] Ironically, CCA, in the past a *proven* price-fixer, see *United States v. Container Corporation of America*, 393 U.S. 333 (1969), now complains of private antitrust enforcement by what are at most *alleged* price-collaborators. (See Part IV of CCA's Memorandum). That CCA takes exception to this result is of no avail since the Supreme Court explicity sanctioned it in *Kiefer-Steward* and *Perma-Life*.

It should be observed that *Illinois Brick* also disposes of CCA's contention that any purported benefit to the sheet class as a result of defendants' conspiracy creates any issue. (CCA Memorandum, Part II). Under *Illinois Brick* the measure of plaintiffs' damages is the overcharge they paid; anything else is irrelevant. See *In Re Folding Carton Antitrust Litigation* (opinion attached hereto as Appendix "A"). For the same reason, all of defendant's cases concerning denial of class certification where there is an alleged benefit to a class member (Part III of CCA's Memorandum) are irrelevant.

The sheet plant subclass and its representatives clearly cannot be bound by testimony in another proceeding, even a "related" one, in which they were accorded no opportunity to cross-examine the witnesses CCA relies upon. In an analogous context, involving a stronger claim of case-relatedness, an MDL court in this circuit has just held that determinations in one plaintiff's case have no preclusive effect on another plaintiff's challenge to the same alleged activities of the defendants. See *In re Nissan Motor Corp. Antitrust Litigation*, 1979-1 Trade Cas. ¶ 62,550 (S.D. Fla. 1979). Especially in view of this Court's obligation not to pre-judge the merits, see *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. at 250, it is inappropriate to rely on CCA's highly speculative inferences from another case as a basis for deciding the question of the sheet plant subclass' status here.

In short, CCA is attempting to impugn an entire subclass of hundreds of sheet plant purchasers based on untested inferences from trial testimony concerning not sheet prices, but container prices. CCA itself states that its motion concerns an "indeterminate" number of class members, and its motion alleges no general conspiracy among sheet subclass members.[14]

CCA had ample opportunity on the original class action briefing to present to the Court all instances of sheet plant price exchanges of which it had knowledge. Accordingly, its current motion must be considered as one seeking reconsideration *without advancing any new facts which could not have been*

[14] The Fifth Circuit has set forth the proper manner in which any isolated instances of actual conflict between any subclass members and the rest of the subclass is to be treated. In *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970), *cert. denied*, 410 U.S. 951 (1970), the court held that "if upon hearing on the merits it appears that persons who might otherwise be included in [the class] have an adverse interest to protect, the trial court can realign the parties." 423 F.2d at 58. This is the procedure that should be followed here, in the unlikely event that a few members of the sheet plant subclass are shown to be proponents of defendants' sheet price conspiracy.

presented "the first time around." As in *In Re Walton Hotel Co.*, 116 F.2d 110, 112 (7th Cir. 1940), "[n]o new evidence; no new question of law, which by the exercise of ordinary diligence could not have been presented originally [has been] tendered by the second application." In *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1974), the court rejected a similar reconsideration motion seeking class decertification, stating:

> . . .the proponents of revocation or modification of a class action order should, at a minimum, show some newly discovered facts or law in support of their desired action. Defendants have not met that minimum. *The grounds they list now include those which they gave previously or could have asserted earlier but did not.*

This Court has already denied a motion for reconsideration in which defendant CCA joined, and in light of the fact that CCA could have presented its assertions earlier the instant motion stands in no different light.

III.

CONCLUSION

For all of the foregoing reasons, there was no error made in certifying the sheet plant subclass. The motions of the eleven settling defendants to merge or to decertify the sheet plant subclass should be denied.

Respectfully submitted,

/s/ H. Laddie Montague, Jr.
H. Laddie Montague, Jr.
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CERTIFICATE OF SERVICE

I, Roger J. Bernstein, hereby certify that I caused a copy of the foregoing Memorandum of Sheet Class Representative Atlas Container Company n Opposition to 1. Motion of Certain Settling Defendants to Merge the Sheet Plant Subclass with the Container Purchaser Subclass; and 2. Motion of Defendant CCA to Decertify the Sheet Plant Subclass (defendants' motions which were served upon counsel for subclass representative Atlas Container Co. by first class mail and were received on May 7, 1979), to be served on this 11th day of May, 1979, by express mail upon Richard N. Carrell, Esquire, Fulbright & Jaworski, 800 Bank of the Southwest Bldg., Houston, Texas 77002, John J. McHugh, Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd., 8550 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606, Steven Susman, Esquire, Mandell & Wright, 806 Main Street, Houston, Texas 77002, Robert J. Malinak, Esquire, 3000 One Shell Plaza, Houston, Texas 77002, and by first-class mail or hand delivery upon counsel for each other party to this litigation as indicated on the latest service lists received by the undersigned.

/s/ Roger J. Bernstein
Roger J. Bernstein

APPENDIX "A"

[Copy of Pretrial Order No. 32 ("Memorandum and Order") in *In re Folding Carton Antitrust Litigation*, MDL No. 250, served with Court's copy of this memorandum only, since this opinion was already served on all counsel as an appendix to Plaintiffs' Motion for Rehearing With Respect to ¶ 11 of Pretrial Order No. 11]

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Texas

Houston Division

In re Corrugated Container Antitrust Litigation	MDL Docket No. 310

NOTICE OF FILING OF AFFIDAVIT IN SUPPORT OF OBJECTIONS OF CERTAIN ACTIVE AND RESERVE CLASS REPRESENTATIVES AND CLASS MEMBERS TO FINAL APPROVAL OF PROPOSED SETTLEMENTS

YOU ARE HEREBY NOTIFIED that copies of the attached Affidavit in Support of Objections of Certain Active and Reserve Class Representatives and Class Members to Final Approval of Proposed Settlements, together with the Appendices annexed thereto, were mailed to the Clerk of the District Court of the United States for the Southern District of Texas, Houston Division, for filing, this 29th day of November, 1979.

Dated: November 29, 1979.

Respectfully submitted,

THE ACTIVE AND RESERVE CLASS REPRESENTATIVES AND MEMBERS OF THE CLASS AS DESIGNATED HEREAFTER

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CFS Continental, Inc.
Harold Freund Baking Co.
Harold Freund Baking Co. of San Jose
Harold Freund Baking Co. of Florida
Harold Freund Baking Co. of Hawaii, Inc.
Barg & Foster, Inc.
Melster Candies, Inc.
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Erie Seating Packing Company
A.J.P. Food Products Co.
D.O.B. Food Products Co.

By /s/ Granvil I. Specks
Granvil I. Specks

By /s/ James B. Sloan
James B. Sloan

IN THE DISTRICT COURT OF THE UNITED STATES

For The Southern District of Texas
Houston Division

In Re Corrugated Container Antitrust Litigation	}	MDL Docket No. 310

AFFIDAVIT IN SUPPORT OF OBJECTIONS OF CERTAIN ACTIVE AND RESERVE CLASS REPRESENTATIVES AND CLASS MEMBERS TO FINAL APPROVAL OF PROPOSED SETTLEMENTS

State of Illinois
County of Cook } ss.:

GRANVIL I. SPECKS and JAMES B. SLOAN, being duly sworn on oath, depose and state the following based upon knowledge, information and belief:

I.

INTRODUCTION

1. Granvil I. Specks, of the law firm of Specks and Goldberg, Ltd., 180 North LaSalle Street, Chicago, Illinois, 60601, is a member of Plaintiffs' Steering Committee in the above litigation and counsel for the following members of the Container Purchaser subclass:

CFS Continental, Inc.
Harold Freund Baking Co.
Harold Freund Baking Co. of San Jose
Harold Freund Baking Co. of Florida
Harold Freund Baking Co. of Hawaii, Inc.
Barg & Foster, Inc.
Melster Candies, Inc.
Allied Van Lines, Inc.

2. James B. Sloan, of the law firm of Sloan and Connelly, P.C., 111 West Washington Street, Chicago, Illinois 60602, is a member of Plaintiffs' Steering Committee in the above litigation and counsel for Ilikon Corporation, an active class representative and member of the Container Purchaser subclass.

3. This Affidavit is submitted in support of the Objections of Certain Active and Reserve Class Representatives and Class Members to the Proposed Settlements and Motion for Discovery Relating to the Fairness and Adequacy of the Proposed Settlements and the Conduct of Settlement Negotiations Prior to Any Hearing on Final Approval of the Proposed Settlements dated October 25, 1979.

II.

THERE IS AN INHERENT CONFLICT OF INTEREST BETWEEN CONTAINER AND SHEET PURCHASERS WHICH HAS RESULTED IN A LACK OF ADEQUATE REPRESENTATION OF THE CLASS AND RESPECTIVE SUBCLASSES IN SETTLEMENT NEGOTIATIONS

1. Twenty-three (23) proposed settlements, aggregating $298.2 million, have been negotiated on behalf of purchasers of containers and sheets. There are 12 proposed settlements (pre-January 5, 1979 settlements), aggregating $78.7 million, for container and sheet plant purchasers jointly which set forth one single dollar amount for both container and sheet purchasers. (See list of such settlements attached hereto as Appendix 1.) There are 11 additional proposed settlements (post-January 5, 1979 settlements), aggregating $219.5 million, purportedly negotiated on behalf of the container purchaser subclass which provide that if the sheet plant subclass representatives apply to take part in such settlements before the Court gives final

approval thereto, there may be allocated to the sheet plant subclass from these settlements an amount not to exceed the lesser of (a) a specified dollar figur- ($14.9 million), or (b) an amount that bears the same ratio to the entire principal of the settlement fund from these settlements that the aggregate sales in dollars of corrugated sheets sold by this group of settling defendants bears to their aggregate sales in dollars of corrugated containers and corrugated sheets during the years 1972-1976. (See list of such settlements attached hereto as Appendix 2.)

2. Pursuant to plaintiffs' Motion for Class Certification, this Court, on September 6, 1978, certified a class consisting of "all persons in the United States (excluding defendants and all subsidiaries and affiliates of defendants and all independent corrugated box manufacturers) who purchased corrugated containers or corrugated sheets from any defendants, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978." Memorandum and Order dated September 6, 1978, p. 1.

3(a). In October, 1978, plaintiffs Great Northern Packaging Corp. and Huron Packaging Corp. filed a motion to clarify, or in the alternative to amend, the Court's class certification order of September 6, 1978 so as to create a separate class or subclass of sheet plants. The *uncontroverted* affidavit of James L. Kowall, President of Great Northern Packaging Corp., filed in support of such motion, articulated the inherent conflict of interest between container and sheet purchasers as follows:

> "6. There are three principal functional levels within the corrugated container industry, viz: (a) manufacture of liner board and medium (containerboard), (b) fabricating corrugated sheets, and (c) manufacture of corrugated containers and corrugated material for use in and with the containers."

* * *

"11. The Great Northern Packaging Corp.'s complaint alleges a price-fixing conspiracy in the sale of corrugated sheets. By its very definition, any such price-fixing conspiracy occurred at the corrugater level of the industry (Par. 6, item (b) above). The price-fixing concerning which the *purchasers of containers* complain occurred at the container-converter level. They involve two different products, two different sets of prices and, in some cases, different sets of wrongdoers."

"12. From my knowledge and experience in the industry, I know that container-purchasers cannot adequately and properly represent sheet plants. Container-purchasers are not in the business of purchasing sheets; container-purchasers purchase their containers (and associated pads, partitions, etc.) from converters (whether integrated or independent sheet plants). Container-purchasers thus have no vital interest to serve in proving a conspiracy to fix the prices of sheets. On the other hand, the vital interest of the independent sheet plants is to prove a conspiracy to fix the prices of corrugated sheets. The sheet plants have no interest in proving a conspiracy by the integrated companies to fix the prices of containers (the finished product.)"

(See Affidavit of James L. Kowall attached hereto as Appendix 3.)

(b) Some independent sheet plants, who are members of the class and the sheet plant subclass, are listed as named conspirators in the Bill of Particulars dated July 21, 1978 filed by the United States Department of Justice in the corrugated container criminal cases.

4. Thereafter, by Pretrial Order No. 7 dated December 28, 1978, this Court in recognition of the inherent conflict between

container and sheet plant purchasers and with no opposition from Plaintiffs' Steering Committee granted the Great Northern Packaging Motion and created two subclasses: (1) the Container Purchaser subclass, which is comprised of the class as defined in its Memorandum and Order of September 6, 1978, except for members of the Sheet Plant subclass, and (2) the Sheet Plant subclass, which is comprised of all sheet plants who purchased corrugated sheets in the United States during the period January 1, 1960 to January 25, 1978. The Court designated Great Northern Packaging Corp. and Atlas Container Co., Inc. as representatives of the Sheet Plant subclass and also designated Aram Hartunian and H. Laddie Montague, Jr. as co-counsel for such subclass.

A.

The Twelve Proposed Pre-January 5, 1979 Settlements For Container And Sheet Plant Purchasers Were Negotiated By Counsel In Inherent Conflict Of Interest Positions; Neither Sheet Plant Purchasers Nor Container Purchasers Were Adequately Represented In Connection With The Negotiation Of The Pre-January 5, 1979 Settlements; Court Has No Basis For Approving The Proposed Plan Of Allocation And Distribution Of The Pre-January 5, 1979 Settlements.

5. In connection with the negotiation of the pre-January 5, 1979 proposed settlements for container and sheet plant purchasers, neither sheet plant purchasers nor container purchasers were adequately represented. Such settlements were negotiated by counsel in inherent conflict of interest positions:

(a) The twelve pre-January 5, 1979 settlements with container and sheet plant purchasers (see Appendix 1), aggregating $78.7 million, were negotiated by an ad hoc settlement committee ("AHSC") consisting of Messrs. Susman, Opperman, Cohen, Corinblit, Cooper and Montague. All of such counsel (except Mr. Montague) were counsel solely for container purchasers.

(b) At the time of negotiation of the pre-January 5, 1979 settlements, Mr. Montague was counsel for plaintiffs I. Kaplan, Inc., Mid-Valley Packing Co., Inc. and Atlas Container Co., Inc. Plaintiffs Mid-Valley and Kaplan were container purchasers; and plaintiff Atlas Container Co., Inc., one of the designated representatives of the Sheet Plant subclass, was a sheet plant purchaser which "is no longer in business. It went out of business in the early seventies." (Transcript of Pretrial Hearing of December 14, 1978, p. 104). Thus, Mr. Montague had a conflict of interest because of his representation of multiple parties (both container purchaser and sheet plant plaintiffs) with directly conflicting interests and could not have properly represented the interests of either sheet plant or container purchasers in connection with the negotiation of the pre-January 5, 1979 settlements.

(c) Based on the *Objections of Plaintiff Atlas Container Co., Inc. to all Post January 5, 1979 Settlements* filed by Atlas' attorney, Mr. Montague did not and could not have properly represented the interests of either sheet plant purchasers or container purchasers in connection with the negotiation of the pre-January 5, 1979 settlements or in any other settlement negotiations. As stated therein:

> "The post-January 5, 1979 settlements were negotaited between representatives of the settling defendants and counsel for representatives of the container purchaser subclass. Counsel for the sheet plant subclass had recently been appointed by the Court* and did not feel prepared at that time to determine what would constitute a reasonable settlement on behalf of the sheet plant subclass, or whether the sheet plant subclass' damages were equal to or different from the damages suffered by the container purchaser subclass." (Objections of Plaintiff Atlas Container Co., Inc. To All Post-January 5 Settlements, p. 2) (footnote omitted).

(d) The other members of the AHSC, who are counsel for container purchasers, could not properly negotiate the pre-January 5, 1979 settlements on behalf of sheet plants who have interests which directly conflict with those of container purchasers. To the extent such other counsel negotiated the pre-January 5, 1979 settlements for both container purchasers and sheet plants, they had an inherent conflict of interest and, therefore, did not and could not properly represent container purchasers.

6. The Notice to Purchasers of Corrugated Containers and Corrugated Sheets of Class Determination dated August 1, 1979 states, and the proponents of the pre-January 5, 1979 settlements have proposed a plan of allocation and distribution for such settlements which provides that, "subject to approval of the court, all class members may share in the above twelve [pre-January 5, 1979] settlements, after the deduction of attorneys' fees and costs, on the basis of allowable purchases (i.e., purchase of corrugated containers or sheets from any defendant or subsidiary or affiliate of any defendant during the period January 1, 1960 through 1978) by each class member, regardless of subclass," with the "purchase information obtained from [the Proof of Claim] forms [to] be used to compute the share which each claimant will receive." Under such plan of allocation and distribution, the pre-January 5, 1979 settlement funds will be allocated among container and sheet plant purchasers according to "claims," without regard to any estimate of actual damages sustained by the container purchasers and sheet plant purchasers, respectively. Where, as here, there has been no showing by the proponents of the pre-January 5, 1979 settlements that the price overcharge or amount of damages sustained by container purchasers and sheet plants, respectively, is the same, this Court has no basis for approving an allocation of the pre-January 5, 1979 settlements between container and sheet plant purchasers on the "claims" basis which the proponents of the settlements advocate.

B.

The Eleven Proposed Post-January 5, 1979 Settlements For The Container Purchaser Subclass Were Negotiated By Counsel Having A Conflict Of Interest And, As A Result, The Container Purchaser Subclass Was Not Adequately Represented In Negotiating These Settlements; The Proposed Allocation Of A Portion Of The Eleven Post-January 5, 1979 Settlements To The Sheet Plant Subclass Is Further Evidence Of Conflict Of Interest And Lack Of Adequate Representation In The Negotiation Process

7. In connection with negotiation of the post-January 5, 1979 settlements, the container purchaser subclass was not adequately represented. Although purportedly negotiated solely on behalf of the container purchaser subclass, such settlements were in actuality negotiated by counsel for the container purchaser subclass, which had interests that directly conflict with those of the sheet plant subclass, on behalf of both the container purchaser and sheet plant subclasses. Thus, counsel for the container purchaser subclass, who negotiated the post-January 5, 1979 settlements, had an inherent conflict of interest and, as a result, did not and could not properly represent the container purchaser subclass:

(a) The eleven post-January 5, 1979 settlements (see Appendix 2), aggregating $219.5 million, purportedly negotiated on behalf of the container purchaser subclass provide that if the sheet plant subclass representatives apply to take part in such settlements before the Court gives final approval thereto, there may be allocated to the sheet plant subclass from these settlements, subject to approval of the Court, an amount not to exceed the lesser of (a) a specified dollar figure ($14.9 million), or (b) an amount that bears the same ratio to the entire principal of the settlement fund from these settlements

that the aggregate sales in dollars of corrugated sheets sold by this group of settling defendants bears to their aggregate sales in dollars of corrugated containers and corrugated sheets during the years 1972-1976.

(b) In the *Objections to Plaintiff Atlas Container Co., Inc. To All Post-January 5, 1979 Settlements,* Mr. Montague states that he did not participate on behalf of the sheet plant subclass in negotiations leading to the post-January 5, 1979 settlements which provide for the allocation of a portion of the container purchaser subclass fund from these settlements to the sheet plant subclass.

(c) Although purportedly negotiated solely on behalf of the container purchaser subclass, the post-January 5, 1979 settlements were in actuality negotiated by counsel for the container purchaser subclass, which had interests that directly conflict with those of the sheet plant subclass, on behalf of both the container purchaser and sheet plant subclasses. This is evident from the following:

> *Excerpt from Letter dated May 21, 1979 from John H. Morrison, of Kirkland & Ellis, counsel for Weyerhaeuser Company, to Stephen D. Susman.*
>
> "We are concerned because we believe that the settlement agreement is perfectly clear that the sheet plant sub-class may apply anytime prior to final approval of the Settlement Agreement for an allocation of the funds set aside. We would consider any effort by the container purchaser subclass to preclude the sheet plant sub-class from so applying for those funds to be a material change of the Settlement Agreement rendering it null and void pursuant to paragraph 11, and we doubt that the Court would intend such a change in the Agreement.
>
> "Furthermore, our understanding of the duties and obligations of the container purchaser subclass under paragraph 14 of the Settlement Agreement is that you may in good faith oppose the application of the sheet plant sub-class for the funds set aside but only to the extent that the

amount set aside reflects sales of corrugated sheets by Weyerhaeuser Company in an amount that is greater than its sales to members of the sheet plant sub-class."

Excerpt from Letter dated May 23, 1979 from Earl E. Pollock, counsel for Owens-Illinois, Inc., to Stephen D. Susman

"First, the Settlement Agreement provides that the sheet plant sub-class may apply any time before final approval of the Settlement Agreement for an allocation of the funds set aside for it, and we believe that any attempt by the container purchaser sub-class to prevent such an application would violate the Settlement Agreement.

"Second, we believe that under paragraph 14 of the Settlement Agreement the container purchaser sub-class may not oppose an application of the sheet plant sub-class, except to the extent that the amount set aside reflects sales of corrugated sheets by Owens-Illinois, Inc. in an amount that exceeds its sales to members of the sheet plant sub-class.

"Third, I remind you that in our letter agreement of January 23, 1979 dealing with the Settlement Agreement, we agreed as follows:

> 'This will confirm our discussion and agreement with respect to paragraph 14 of the Settlement Agreement, which provides, subject to the Court's direction, for allocation of a portion of the Fund toward payment of the claims of the Sheet Plant sub-class. In the event that the Sheet Plant sub-class declines to participate in the Settlement Agreement on terms acceptable to that sub-class and the Container Purchaser sub-class, it is contemplated that *the allocated amount specified in paragraph 14 would with Court approval remain available to apply toward any settlement or judgment in favor of the Sheet Plant sub-class with respect to its claims against Owens-Illinois.*" (Emphasis added.)"

True and correct copies of the above-described letters dated May 21, 1979 and May 23, 1979, marked Appendices 4 and 5, respectively, are attached hereto and hereby made a part hereof.

(d) In view of the directly conflicting interests between the container purchaser and sheet plant subclasses and the negotiation of the post-January 5, 1979 settlements by counsel for the container purchaser subclass on behalf of both such subclasses, the provisions of the post-January 5 settlements which provide for the allocation of a portion of the container purchaser subclass recovery to the sheet plant subclass is a unilateral unbargained-for giveaway provision, which constitutes a virtual abdication by the container purchaser subclass representatives and their counsel, who were involved in negotiating these settlements, of their fiduciary duties to the members of the container purchaser subclass; neither the Court nor the class representatives for the container purchaser subclass or their counsel have any power or authority to give away any portion of the container purchaser subclass fund from these settlements to the sheet plant subclass; and, such proposed allocation is contrary to the interests of the container purchaser subclass for whom such settlements were purportedly negotiated and is further evidence of a lack of adequate representation of the container purchaser subclass during the settlement negotiations.

(e) The proposed allocation of a portion of the post-January 5, 1979 settlements to the sheet plant subclass is not based upon any relevent, reliable economic or evidentiary data. There has been no showing by the proponents of the post-January 5, 1979 settlements or determination or attempt to determine relative damages sustained by the two subclasses as a result of defendants' conspiracy or to determine relative probabilities of each subclass proving liability. There is, thus, no meaningful data before this Court on which to base final approval of the post-January 5, 1979 settlements containing the proposed allocation provision.

III.

ADDITIONAL FACTS INDICATE THAT MR. SUSMAN, CHAIRMAN OF PLAINTIFFS' STEERING COMMITTEE AND LEAD COUNSEL FOR PLAINTIFFS, HAS HAD A CONFLICT OF INTEREST SINCE THE INCEPTION OF THIS LITIGATION AND HAS ENGAGED IN CONDUCT VIOLATIVE OF THE CLASS REPRESENTATIVES' FIDUCIARY OBLIGATIONS TO, AND THE DUE PROCESS RIGHTS OF, ABSENT CLASS MEMBERS; THAT ACTIVE AND RESERVE CLASS REPRESENTATIVES HAVE BEEN SYSTEMATICALLY EXCLUDED FROM SETTLEMENT NEGOTIATIONS AND HAVE BEEN DENIED DISCOVERY RELATING TO THE PROPOSED SETTLEMENTS AND THE CONDUCT OF SETTLEMENTS NEGOTIATIONS; AND THAT THERE HAS OTHERWISE BEEN A LACK OF ADEQUATE REPRESENTATION IN THE NEGOTIATION PROCESS

8. In an article entitled "The $300-Million Paper Case" by James B. Stewart, Jr., appearing in the July 1979 issue of *The American Lawyer,* Mr. Susman is quoted as follows:

> "... At first Susman survived as a consultant in antitrust cases, relying on his academic reputation. And then one day a witness in a grand jury proceeding came seeking counsel. The charge being investigated: price-fixing in the giant corrugated paper industry.
>
> "Susman declined to represent the man. 'That would have been a one-shot $4,000 fee, and I could never have been involved in the case.' he says. But he probed for information and the names of other witnesses. What he heard pointed to one of the biggest antitrust cases in history. 'I was itching to file a complaint,' he recalls.

> "But he needed a client. He had previously talked to William Kemp, a lawyer friend in Austin, who said he had a client who purchased corrugated paper. In return for a cut of the action, the lawyer turned Adams Extract Company over to Susman. Susman was among the first to reach the Houston courthouse with a complaint in March 1977."

To the best of affiants' knowledge, information and believe, such Grand Jury witness was an employee or former employee of Delta Container or Houston Corrugated Box Co., Inc. Both Delta Container and Houston Corrugated Box Co., Inc. are listed as named conspirators in the Bill of Particulars dated July 21, 1978 filed by the United States Department of Justice in the corrugated container criminal cases. (See U.S. Justice Department Bill of Particulars annexed as Appendix G to the Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlement dated May 10, 1979). Neither Delta Container nor Houston Corrugated Box Co., Inc. was named as a defendant in the *Adams Extract Company* complaint or in any other private treble-damage antitrust complaints in this litigation on which Mr. Susman is counsel or co-counsel for the named plaintiffs.

9. Mr. Susman procured from four of the designated class representatives (Adams Extract Co.; Winona Industries, Inc.; Bodines, Inc.; and Jefferson Orchards, Inc.) and their counsel (Messrs. Susman, Kemp, Opperman, McGovern, Cohen and Kudon) their agreement, or "willing[ness] to agree", to preconditioned limitations on the constitutionally mandated role and authority of designated class representatives, *viz.*, "the only role played by a class representative that is not played by a reserve class representative is submission to defendants' discovery requests. . . . our client understands that neither it nor

we, as its counsel, by virtue of its designation as a class representative, will have any greater right to control the direction of this litigation (including the participation in the negotiation of and approval of settlements) that it would have if it were a reserve class representative rather than a designated one." (See Memorandum from Steve Susman, Chairman of Plaintiffs' Steering Committee, to All Plaintiffs' Counsel, dated October 5, 1978, re Selection of Designated Class Representatives annexed as Appendix F to the Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements, a copy of which Appendix F has been filed under seal with this Court).

10. On December 29, 1978, Messrs. Sloan and Specks, members of Plaintiffs' Steering Committee, requested that the Steering Committee:

> "Approve and direct an immediate disclosure to the class representatives and reserve class representatives of all economic and other factual information supporting the eleven proposed settlements negotiated to date, including information with respect to the areas of inquiry provided for in § 1.46 of the *Manual for Complex Litigation.*" (See Appendix 6 attached hereto)

The proponents of the proposed settlements have refused to provide active and reserve class representatives Ilikon Corporation, Andre-Bodin Bakeries, Inc., Carron Manufacturing Co., Denver Meat Company, Douglas Furniture Corp., Wittek Golf Supply, Townhouse Furniture and Penthouse Furniture, Ltd. with information with respect to the areas of inquiry provided for in § 1.46 of the *Manual* or economic and other factual information supporting the proposed settlements (except for the Hoyt Affidavits filed in support thereof).

11. Having expressed serious doubt as to whether the proposed settlements, individually and collectively, were fair,

reasonable and adequate, and having refused to approve such settlements absent the development and disclosure of reliable economic and other factual information in support thereof (see Appendix 6), Mr. Susman has systematically excluded Messrs. Sloan and Specks, members of Plaintiffs' Steering Committee, and the above-described active and reserve class representatives and their respective counsel from settlement negotiations.

12. Only proponents of the proposed settlements have been allowed access to the reports of the Settlement Justification Committee. (See Appendix 7 attached hereto)

13. By notice of depositions, filed May 2, 1979, noticing the depositions of Messrs. Hoyt, Susman, Robertson, Montague and Harrison, the above-described active and reserve class representatives sought deposition discovery relating to the proposed settlements and the conduct of the settlement negotiations. Such depositions were noticed for the period May 7-11, 1979 in order that the same could be completed prior to the preliminary hearing scheduled for May 16, 1979. Contrary to the Federal Rules of Civil Procedure, the deponents failed and refused to comply with validly-served subpoenas by appearing for the scheduled depositions even though no protective order had been entered by this or any other court. (See Appendix 8 attached hereto) At the pretrial hearing held May 16, 1978, this Court refused to permit such discovery.

14. By motion dated October 25, 1979, the above-described active and reserve class representatives renewed their request for leave to engage in limited discovery relating to all aspects of the settlement negotiations and the fairness and adequacy of the proposed settlements prior to any hearing on final approval of the proposed settlements. At the pretrial hearing held November 7, 1979, this Court again refused to permit such discovery.

15. In clear violation of fiduciary obligations to, and the due process rights of, absent class members, Mr. Susman, in his capacity as Chairman of Plaintiffs' Steering Committee, has apparently made deals with certain counsel for absent class members which permit such counsel to negotiate a special formula of settlement for the absent class members represented by them that will give their class member clients an "additional amount" or "premium" over and above that which they would recover, percentage-wise, as a class member. (See, for example, the letter dated April 19, 1979 of Richard P. Watson attached hereto as Appendix 9.

Further affiants sayeth not.

/s/ Granvil I. Specks
Granvil I. Specks

/s/ James B. Sloan
James B. Sloan

Subscribed and sworn to before me
this 29th day of November, 1979.

_____

Notary Public

APPENDIX 1

PROPOSED PRE-JANUARY 5, 1979 SETTLEMENTS NEGOTIATED FOR BOTH CONTAINER AND SHEET PLANT PURCHASERS

1. St. Regis Paper Company
2. International Paper Company
3. Union Camp Corporation and Allied Container Corporation
4. Diamond International Corporation
5. Dura Containers, Incorporated
6. The Chesapeake Corporation of Virginia, Baltimore Box Company, Binghamtom Container Co., Inc., Miller Container Corporation, Scranton Corrugated Box Company, Inc., David Weber Co., and Southern Corrugated Box Corporation
7. Longview Fibre Company
8. Boise Cascade Corporation
9. Willamette Industries, Inc., Western Kraft East, Inc., and Corco, Inc.
10. Champion International Corporation/Horner Waldorf
11. Menasha Corporation
12. Consolidated Packaging Corporation

APPENDIX 2

PROPOSED POST-JANUARY 5, 1979 SETTLEMENTS NEGOTIATED FOR CONTAINER PURCHASER SUBCLASS WITH PROVISION FOR ALLOCATION OF PORTION OF SETTLEMENT FUNDS TO SHEET PLANT SUBCLASS

1. Container Corporation of America
2. Weyerhaeuser Company
3. Owens-Illinois, Inc.
4. Olinkraft, Inc.
5. MacMillan Bloedel, Inc., MacMillan Bloedel Containers, Inc., MacMillan Bloedel Packaging, Ltd., and MacMillan Bloedel Limited
6. The Continental Group, Inc.
7. Inland Container Corporation
8. Store Container Corporation
9. St. Joe Paper Company
10. U. S. Corrugated Fibre Box Company
11. Green Bay Packaging, Inc.

APPENDIX 3

State of Michigan
County of Kent } ss.:

AFFIDAVIT OF JAMES L. KOWALL

JAMES L. KOWALL, having been first duly sworn, on oath states as follows:

1. I am now, and have been since its incorporation in March 1970, the majority shareholder and president of plaintiff Great Northern Packaging Corp. I am now, and have been since its incorporation in April 1975, the sole shareholder and president of plaintiff Huron Packaging Corp.

2. I have been employed and engaged in the corrugated container industry continuously for the past twenty-five years.

3. From 1953 to 1966 I was a salesman of corrugated containers for various companies, including, from 1965 to 1966, approximately one year as the sales manager for the Western Michigan area for Consolidated Packaging Corp. I founded Grand Rapids Creative Packaging Co., a sole proprietorship, in October 1966, which was incorporated on January 28, 1967 under the name Grand Rapids Packaging Corp. I was a shareholder and managing officer of that company until January 1970. That company was an independent converter of corrugated containers and it also operated a corrugating plant which I managed. In March 1970 I incorporated plaintiff Great Northern Packaging Corp., which has done business as an independent converter of corrugated containers from March 1970 to the present. On April 24, 1975 I incorporated plaintiff Huron Packaging Corp. which, under my management, did business as an independent converter of corrugated containers until April 30, 1977.

4. I was the principal founder of the Executive Society of Corrugated Sheet Converters, which commenced in July 1972 as an association of independent converters of corrugated containers in Indiana and Michigan.

5. I was the principal founder of the Association of Independent Corrugated Converters (AICC), which commenced in November 1974. AICC is an international trade association of independent corrugated container companies, which was formed in an attempt to correct antitrust and other abuses in the corrugated container industry. I served as its first president from November 1974 to November 1975 and I served as a member of the board of directors from November 1974 to November 1976. I have been and am now chairman of several of its committees.

6. There are three principal functional levels within the corrugated container industry, viz: (a) manufacture of liner board and medium (containerboard), (b) fabricating corrugated sheets, and (c) manufacture of corrugated containers and corrugated material for use in and with the containers.

7. The companies which engage in the fabrication of corrugated sheets are called "corrugators" or "combiners" (item (b) above). This process essentially involves the combination (with adhesives) of liner board and medium. Corrugaters either sell the sheets to independent converters or use the sheets for conversion into containers (item (c) above), or both. Some corrugaters sell corrugated sheets to independent converters. Some companies only convert sheets into containers and associated products; these companies purchase all of their sheets from corrugaters.

8. The companies which perform all three functions are known as "integrated" companies. That is, the integrated companies (a) manufacture liner board and medium, (b)

produce corrugated sheets, and (c) convert the sheets into containers. Liner board and medium are called "containerboard."*

9. A "sheet plant," as that term is commonly used in the industry, is a facility which converts corrugated sheets into containers. A sheet plant purchases corrugated sheets from corrugaters. The term "sheet plant" ordinarily denotes a facility which neither manufactures containerboard nor produces corrugated sheets. A sheet plant purchases sheets from either an integrated company or from an independent corrugator.

10. A sheet plant's customers buy corrugated containers from the sheet plant. Also, some purchasers of containers purchase fillers, pads, die-cut forms or assembled partitions for use in or with those containers. In those instances, the sheet plant cuts sheets to size, die-cuts them, slats them and/or scores (creases) them for that use and purpose. Purchasers of containers, as such, do not buy sheets. Sheet plants buy sheets.

11. The Great Northern Packaging Corp.'s complaint alleges a price-fixing conspiracy in the sale of corrugated sheets. By its very definition, any such price-fixing conspiracy occurred at the *corrugater* level of the industry (¶ 6, item (b) above). The price-fixing concerning which the *purchasers of containers* complain occurred at the container-converter level. They involve two different products, two different sets of prices and, in some cases, different sets of wrongdoers.

12. From my knowledge and experience in the industry, I know that container-purchasers cannot adequately and properly represent sheet plants. Container-purchasers are not in the business of purchasing sheets; container-purchasers purchase their containers (and associated pads, partitions, etc.) from

---

* I am informed that one of the briefs filed in this case recites: "... all persons who ... manufactured containerboard from Kraft liner board...." This is an incorrect and misleading description. Inasmuch as Kraft liner board *is* containerboard, no one manufactures containerboard *from* Kraft liner board. (See *Fibre Box Handbook*, p. 19, a copy of which is attached hereto)

converters (whether integrated or independent sheet plants). Container-purchasers thus have no vital interest to serve in proving a conspiracy to fix the prices of sheets. On the other hand, the vital interest of the independent sheet plants is to prove a conspiracy to fix the prices of corrugated sheets. The sheet plants have no interest in proving a conspiracy by the integrated companies to fix the prices of containers (the finished product).

13. I am informed that a settlement agreement has been made in which St. Regis Paper Company will pay $1,700,000 in return for a complete discharge of all claims against St. Regis. St. Regis is, and was at all relevant times in the past, an integrated company which sold both corrugated sheets (to independent sheet plants) and finished containers. St. Regis' share of the corrugated sheet market was much greater than its share of the finished container market. St. Regis is one of the five largest sellers of corrugated sheets in the United States. Plaintiff Huron Packaging Corp. alone, which is only one of approximately 800 such sheet plants in the United States, in just a two-year period, purchased approximately $987,000 of corrugated sheets from St. Regis.

/s/ James L. Kowall
James L. Kowall

SUBSCRIBED AND SWORN TO
before me this 10th day
of October, 1978.

/s/ Genevieve Campbell
Genevieve Campbell
Notary Public
Commission expires 11/12/1982

APPENDIX 4

KIRKLAND & ELLIS

200 East Randolph Drive
Chicago, Illinois 60601

Chicago Office
Area Code 312 861-2000
Telex 25-4361
To Call Writer Direct
312 861-2252

Washington Office
1776 K Street, N.W.
Washington, D.C. 20006
202 857-5000

May 21, 1979

Stephen D. Susman, Esq.
Mandell & Wright
21st Floor
806 Main Street
Houston, Texas 77002

Re: Corrugated Container Antitrust Litigation—MDL 310

Dear Steve:

We are writing to express our concern over ambiguities in your statements and the statements of other counsel in court on Wednesday, May 16 in respect of that portion of the settlement fund set aside for the sheet plant sub-class in the Settlement Agreement between the container purchaser sub-class and our client Weyerhaeuser Company.

We are concerned because we believe that the Settlement Agreement is perfectly clear that the sheet plant sub-class may apply anytime prior to final approval of the Settlement Agreement for an allocation of the funds set aside. We would consider any effort by the container purchaser sub-class to

preclude the sheet plant sub-class from so applying for those funds to be a material change of the Settlement Agreement rendering it null and void pursuant to paragraph 11, and we doubt that the Court would intend such a change in the Agreement.

Furthermore, our understanding of the duties and obligations of the container purchaser sub-class under paragraph 14 of the Settlement Agreement is that you may in good faith oppose the application of the sheet plant sub-class for the funds set aside but only to the extent that the amount set aside reflects sales of corrugated sheets by Weyerhaeuser Company in an amount that is greater than its sales to members of the sheet plant sub-class.

KIRKLAND & ELLIS

The position expressed by Mr. Specks on May 16, that he or others may question the terms of the paragraph establishing the reserve for application by the sheet plant sub-class, certainly must not deter you and your container purchaser sub-class from carrying out your duties and obligations under the Settlement Agreement. We trust, therefore, that this week you are negotiating with the sheet plant sub-class as contemplated by our Agreement.

Sincerely yours,
/s/ John H. Morrison
John H. Morrison

JHM:jel

cc: Hon. John V. Singleton, Jr.
Plaintiffs' Attorneys-in-Charge
Defendants' Attorneys-in-Charge

APPENDIX 5

SONNENSCHEIN CARLIN NATH & ROSENTHAL

8000 SEARS TOWER CHICAGO ILLINOIS 60606

(312) 876-8000 TELEX 25-3626

May 23, 1979

WRITER'S DIRECT LINE 876-8093

BY TELECOPIER

Stephen D. Susman, Esq.
Mandell & Wright
806 South Main Street
21st Floor
Houston, Texas 77002

Re: MBL 310—Corrugated Container
Antitrust Litigation

Dear Steve:

Paragraph 14 of the Settlement Agreement between Owens-Illinois, Inc. and the container purchaser sub-class provides for the allocation of a portion of the settlement fund toward payment of the claims of the sheet plant sub-class. In

light of the discussions at the May 16 hearing which related to this allocation, I am writing to inform you of Owens-Illinois, Inc.'s understanding of certain rights and duties of the parties with respect to this allocation.

First, the Settlement Agreement provides that the sheet plant sub-class may apply any time before final approval of the Settlement Agreement for an allocation of the funds set aside for it, and we believe that any attempt by the container purchaser sub-class to prevent such an application would violate the Settlement Agreement.

Second, we believe that under paragraph 14 of the Settlement Agreement the container purchaser sub-class may not oppose an application of the sheet plant sub-class, except to the extent that the amount set aside reflects sales of corrugated sheets by Owens-Illinois, Inc. in an amount that exceeds its sales to members of the sheet plant sub-class.

Third, I remind you that in our letter agreement of January 23, 1979 dealing with the Settlement Agreement, we agreed as follows:

> "This will confirm our discussion and agreement with respect to paragraph 14, of the Settlement Agreement, which provides, subject to the Court's direction, for allocation of a portion of the Fund toward payment of the claims of the Sheet Plant sub-class. In the event that the Sheet Plant sub-class declines to participate in the Settlement Agreement on terms acceptable to that sub-class and the Container Purchaser sub-class, it is contemplated that *the allocated amount specified in paragraph 14 would with Court approval remain available to apply toward any settlement or judgment in favor of the Sheet Plant sub-class with respect to its claims against Owens-Illinois.*" (Emphasis added.)

We fully expect you and your colleagues on the plaintiffs' steering committee to honor this agreement in full.

Very truly yours,

/s/ Earl E. Pollock
Earl E. Pollock
Attorney for Owens-Illinois, Inc.

EEP: rrh

cc: Hon. John V. Singleton, Jr.
Plaintiffs' Attorneys-in-Charge
Defendants' Attorneys-in-Charge

APPENDIX 6

LAW OFFICES
SPECKS & GOLDBERG, LTD.
180 NORTH LASALLE STREET • SUITE 2316
CHICAGO, ILLINOIS 60601

(312) 236-2725

December 29, 1978

To: Members of the Steering Committee

Re: Corrugated Container Antitrust Litigation M.D.L. Docket No. 310

Gentlemen:

At the Steering Committee meeting scheduled for January 5, 1979, the following matters should be acted upon by the Steering Committee:

1. Approve the filing with the Court of a motion for reconsideration of the Court's December 14, 1978 ruling with respect to the deferral of any preliminary determination as to the reasonableness of proposed settlements and the use of separate 23(c)(2) and 23(e) notices.

2. Approve the filing of a notice of appeal with respect to the Court's December 14, 1978 ruling.

3. Approve and direct an immediate disclosure to the class representatives and reserve class representatives and of all economic and other factual information supporting the eleven proposed settlements negotiated to date, including information with respect to the areas of inquiry provided for in § 1.46 of the *Manual for Complex Litigation*.

4. With respect to the eleven proposed settlements, there is a conflict between sheet—and corrugated container—purchaser class members and a lack of typicality and adequacy of certain class representatives; and, in addition, there is a serious doubt as to whether the eleven proposed settlements negotiated to date, individually and collectively, are fair, reasonable and adequate. Under the circumstances, the Steering Committee should approve the deferral of any further settlement negotiations pending resolution of these problems and the development of sufficient economic and other factual information. Also, the class representatives and reserve class representatives should be accorded an opportunity to review and assess the reasonableness of the eleven proposed settlements, both individually and collectively, after such economic and other factual information has been developed and full disclosure of the same has been made to them.

Sincerely yours,

/s/ Granvil I. Specks
Granvil I. Specks

/s/ James B. Sloan
James B. Sloan
Members of the Plaintiffs' Steering Committee.

dw

cc: All other plaintiffs' counsel.

APPENDIX 7

Received March 5, 1979

MANDELL & WRIGHT
ATTORNEYS AND COUNSELLORS
Houston, Texas 77002

March 1, 1979

March 1, 1979

TO: Steering Committee
FROM: Steve Susman
IN RE: Corrugated Container Antitrust Litigation

I am scheduling a meeting of the Plaintiffs' Steering Committee at 11:00 A.M. or Wednesday, April 4, 1979, in Washington, D.C. Many of us will be in Washington at that time anyway for the Spring Meeting of the Antitrust Section. The primary function of the meeting will be to review our proposed submission in support of settlements due to be filed with the Court on April 9th. Other items may be added to the agenda, which will be circulated in a few weeks, but I would ask that only proponents of the settlements attend that portion of the meeting directed to securing their approval.

I will notify you shortly of the precise location of the meeting and I would appreciate hearing from you as to any additional items that you think should be included on the agenda.

I want to emphasize again the importance of all Steering Committee Members being current with their time reports and assessments. Since we have begun removing work assignments from plaintiffs' attorneys who are delinquent, we can hardly ignore Steering Committee members who fail to abide by regulations that they themselves promulgated.

SDS/wsc

cc: Laddie Montague
Aram Hartunian
Harold Collins

AGENDA FOR STEERING COMMITTEE MEETING

April 4, 1979

Washington, D. C.*

*11:00 A.M.***

1. Report of Settlement Justification Committee
   a. Review presentation by experts
   b. Review memorandum in support of settlements
   c. Fees and Expenses
   d. Allocation Among Class Members

2:00 P.M.

2. Report of Class Action Committee
   a. Preparation of Class List
   b. Proposed form of Class Notice
   c. Amendment to IP Settlement to Fund Notice Costs
3. Report of Finance Committee
4. Report of Briefing Committee
   a. Westvaco's Motion to File Cross-Claims

---

* To be held at office of Ken Kudon
Danzansky, Dickey, Tydings, Quint & Gordon
1010 Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-857-4066

** *Only the proponents of the settlements should attend this portion of the Steering Committee meeting.*

b. Role as amicus in 5th Circuit case involving contribution

c. Methods of Obtaining Grand Jury Materials Other than from Defendants (*e.g.*, R.6(e))

d. Motion to Reconsider Court's order requiring plaintiffs to produce financial statements

5. Report of Plaintiffs' Compliance with Defendants Discovery Committee

6. Report of Discovery Committee

a. Review of Deposition List for May and June

b. Changes in Discovery Subcommittee Assignments

c. Proposal for regional discovery co-ordinators

d. Review of outline for Deposition Taking Procedures

e. Review of on-site inspection manual

f. Schedule for concluding document inspection

7. Report of Criminal Trial Committee

8. Review of Hardship Settlement Overtures

a. Consolidated

b. Alton

c. Interstate

9. Other Business

APPENDIX 8

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of Texas

Houston Division

In Re Corrugated Container Antitrust Litigation } MDL No. 310

AFFIDAVIT OF GRANVIL I. SPECKS

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

GRANVIL I. SPECKS, being duly sworn on oath, deposes and states:

1. I am one of the attorneys for the active and reserve class representatives in the above-captioned litigation which filed and served the notice of depositions and subpoenas with respect to the depositions of Messrs. Hoyt, Susman, Robertson, Montague and Harrison, scheduled for May 7-11, 1979.

2. On Friday, May 4, 1979, Mr. B. D. Daniels, of the law firm of Mandell & Wright, Houston, Texas, telephoned the affiant and stated in words or in substance that they were going to file with the Court a Motion to quash the above-described subpoenas and notice of depositions and that Mr. Hoyt and the other deponents would not comply with the subpoenas by appearing for the scheduled depositions.

Further affiant sayeth not.

/s/ Granvil I. Specks
Granvil I. Specks

Subscribed and sworn
to before me this 10th
day of May, 1979.

/s/ Lynn Vogwill
Lynn Vogwill
Notary Public

APPENDIX 9

WATSON, ROCHFORD & HAYES

ASSOCIATES IN THE PRACTICE OF LAW
3345 INDIANA NATIONAL BANK TOWER
ONE INDIANA SQUARE
INDIANAPOLIS, INDIANA 46204
TELEPHONE: (317) 635-3345
CABLE ADDRESS
"ATWOCAVE"

SALEM, INDIANA
OFFICE
202 SOUTH MAIN STREET
SALEM, INDIANA 47167
TELEPHONE: (812) 883-2204

April 19, 1979 **PERSONAL & CONFIDENTIAL**

Dear Rex:

Re: Corrugated Box Multi District Litigation MDL 310

It was indeed a pleasure to chat with you and be with you at our meeting in Chicago on the 17th of April. Per your request, I enclose herewith merely a "summary of our meeting, my recommendations and thoughts, and the manner that this firm would be willing to represent Allied in those matters as you determine appropriate.

At our meeting, I summarized for you in detail, the various "positions" and "alternatives" which we determine are appropriate and necessary in this litigation. As I indicated in great summary to you, we have had an opportunity to review all of the "plaintiffs confidential depository", to see and determine the various positions that the defendants are taking in this litigation, to review the status of the present criminal case presently going on, which began on January 22, 1979, the Government having rested after thirty-four (34) Government witnesses, on March 14; the defense through March 29th had put on thirty-two (32) witnesses. I reviewed for you the various

Statutory matters that were of concern to us and our thoughts as to how, at least we feel you should proceed, which is, in our opinion, exactly parallel to MWA's position.

My recommendation at this time, based upon the facts and information that I have, and which I gave to you in some detail at our two or three hour meeting on Tuesday, is as follows:

(1) I would recommend at this time that Allied consider staying in the Class, that the Class be monitored through the writer, working with counsel for the Plaintiff's Steering Committee all as I would disclose to you personally, pursuant to the current understanding that I have with the committee chairman;

(2) Additionally, as a result of our monitoring the Class, determine if there is any position we can take in the Class, to get the Class to set over to Allied an "additional amount", above and beyond that which would normally percentage-wise come to Allied from the Class;

(3) Contact the defendants who you made purchases from 1960 through 1978, but whom you are not presently purchasing, concerning a cash settlement as a premium above the Class Division, and I of course, would propose that all of the industry plaintiffs join in the demand proportionately to the business they had with the particular defendant;

(4) Negotiate a settlement with those suppliers with whom you made purchases in the past, and are presently buying from, on a special formula of settlement, which I have devised and which Mr. Sussman in discussing with him, thought it was an excellent approach. If we represent you of course, I will disclose the formula to you for your review and approval.

You must be concerned with the expense involved in this litigation. I do feel it imperative that the Class Action be monitored weekly. In doing this, I have attempted to come up with some kind of a continguency relationship, which would compensate us in some manner for our time, and would provide what we feel is necessary to Allied to insure, not only complete representation, but the "top dollar" in this litigation, as follows:

1. On monitoring the Class Action litigation, providing you with weekly or monthly reports as we accumulate and review the pleadings and information, I would receive a fee of fifteen (15) percent of the total amount recovered from Allied, LESS a retainer, which I would propose be advanced to me on the date of an understanding of $5,000.00, plus out-of-pocket expenses for actual travel, (your portion thereof), long distance telephone calls directly attributable to Allied and priority postage.

2. For any amounts that I successfully recover on behalf of Allied as a "premium" above and beyond that paid by the Class, but out and from the Class, I would be paid twenty-five (25) percent of the gross amount recovered;

3. For amounts that I recover from Allied as a result of negotiations with those suppliers above and beyond the Class, one-third (1/3) of the gross amount recovered, plus out-of-pocket expenses.

Needless to say, this latter category is going to be the "tough one" and rest assured, anything we get in either of the categories 2 and 3 will be a premium settlement.

I believe this pretty well sums up my comments and discussions, and I would appreciate your thoughts at your earliest possible convenience, since I do feel it important that

decisions be reached, initial ground work be laid during the monitoring of the Class Action, "proofs of claims" start to be formulated, and matters of that nature.

Yours truly,

WATSON, ROCHFORD & HAYES

Richard P. Watson

Rex C. Denkmann, Esquire
Associate General Counsel
Allied Van Lines
25th Avenue and Roosevelt Road
Broadview, Illinois 60153

RPW/pjn

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 1979, a copy of the foregoing Notice of Filing of Affidavit in Support of Objections of Certain Active and Reserve Class Representatives and Class Members to Final Approval of Proposed Settlements, together with the Affidavit and Appendices attached thereto, was mailed to all counsel of record for the plaintiffs and the defendants in the Corrugated Container Antitrust Litigation, M.D.L. Docket No. 310.

/s/ Granvil I. Specks
Granvil I. Specks

Opposition

1

No. 81-1820

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CFS CONTINENTAL, INC.; HAROLD FREUND BAKING CO. OF SAN JOSE; HAROLD FREUND BAKING CO. OF FLORIDA; HAROLD FREUND BAKING CO. OF HAWAII, INC.; BARG & FOSTER, INC.; MELSTER CANDIES, INC.; ALLIED VAN LINES, INC.; and WITTEK GOLF SUPPLY CO., INC.,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, *et al.*,

Respondents.

BRIEF OF CERTAIN SETTLING DEFENDANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY L. KING
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

Counsel of Record for Respondent International Paper Company, on behalf of the Settling Defendants-Respondents and their counsel listed at the end of this brief

Counterstatement of the Questions Presented for Review

1. Did the Court of Appeals correctly hold that the district court did not abuse its discretion in finding the settlements at issue fair, reasonable and adequate, based upon extensive findings, after an evidentiary hearing, evaluating every aspect of class plaintiffs' case on the merits and addressing every objection raised?

2. Did the Court of Appeals correctly hold that the district court did not abuse its discretion in finding that the attorneys negotiating a settlement on behalf of class plaintiffs, who shared an overriding goal of maximizing the settlement recovery for the entire class, adequately represented the interests of those class plaintiffs?

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-1820

CFS CONTINENTAL, INC.; HAROLD FREUND BAKING CO. OF SAN JOSE; HAROLD FREUND BAKING CO. OF FLORIDA; HAROLD FREUND BAKING CO. OF HAWAII, INC.; BARG & FOSTER, INC.; MELSTER CANDIES, INC.; ALLIED VAN LINES, INC.; and WITTEK GOLF SUPPLY CO., INC.,

Petitioners,

VS.

ADAMS EXTRACT COMPANY, *et al.*,

Respondents.

BRIEF OF CERTAIN SETTLING DEFENDANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Statement of the Case

The petition seeks review of two decisions of the United States Court of Appeals for the Fifth Circuit upholding final approval of twenty-two settlements in the *Corrugated Container Antitrust Litigation,* MDL 310. These settlements, which total almost $300 million plus substantial accumulated interest of over $175 million, represent the largest total or partial settlement to date of any class action.

Final approval of the settlements was originally granted by the district court on December 21, 1979 (App. 6-23). Repeated attempts by a small group of dissident class members to upset the settlements, however, continue to delay distribution of the settlement funds to the plaintiff class. The petitioners here, representing only a tiny fraction of the container purchaser plaintiff subclass, have consistently sought to block approval of the settlements despite their overwhelming acceptance by other members of the class.

The petitioners seek issuance of a writ of certiorari in order to relitigate their challenges to certain aspects of the findings of fact entered by the district court. These findings were entered by the district court in the exercise of its discretion under Rule 23 of the Federal Rules of Civil Procedure and have received careful review and approval by the Court of Appeals. Petitioners do not raise a single important question of federal law. Such a showing does not meet the standards for granting review upon a petition for certiorari.

A. Background of the Litigation

The class actions and a number of individual suits which make up MDL 310 were instituted in the spring of 1977 against thirty-seven major manufacturers of corrugated containers and corrugated sheets, alleging that the defendants had conspired since at least 1960 to fix the price of their products in violation of the Sherman Act. In January 1978 a grand jury in the Southern District of Texas indicted fourteen of the corporate defendants on essentially the same allegations (App. 39). In the spring of 1979 the criminal cases were tried to a jury, and all defendants remaining in the case were acquitted (App. 7). The same district court judge presided over both the civil and criminal cases.

B. The MDL 310 Settlements

The settlements which are the subject of this petition were negotiated by a Plaintiffs' Steering Committee appointed by the district court and explicitly authorized to conduct settlement negotiations (App. 41). One of the two attorneys representing petitioners here was and still is a member of the Committee. *All* plaintiffs' counsel were kept fully advised of the negotiations (Brief of Class Plaintiffs-Appellees to Fifth Circuit Court of Appeals (July 14, 1980) at 4) (hereinafter "Brief of Class Plaintiffs-Appellees").

Between July and December 26, 1978, the Steering Committee concluded settlements with eleven defendants totalling $78 million (App. 44) (Brief of Class Plaintiffs-Appellees at 5). The district court certified a single class of purchasers of corrugated containers and sheets on September 6, 1978 (App. 43). On December 26, 1978, the district court, in response to an unopposed motion, entered an order designating two subclasses: container purchasers and sheet plants, and appointing separate representative plaintiffs for the sheet plant subclass. Thereafter, the Steering Committee was authorized to negotiate and did negotiate only on behalf of the container purchaser subclass (App. 44).

During the month of January 1979, the Steering Committee negotiated eleven more settlements aggregating nearly $220 million (App. 44-45) (Brief of Class Plaintiffs-Appellees at 7). Counsel for the newly-appointed representatives of the sheet plant subclass declined to join in those negotiations although invited by the Steering Committee to do so (Brief of Class Plaintiffs-Appellees at 6). The negotiating defendants, however, were understandably reluctant to enter into settlements which did not include the sheet plant subclass (App. 44). Accordingly, the

settlements entered into after December 26, 1978, while binding only upon the container purchaser subclass, earmarked a portion of the settlement funds as subject to claim by the sheet plant subclass in the event that group elected to participate in these settlements and was permitted to do so by the court (App. 44-45). Eventually the sheet plant subclass did elect to participate, and was alloted $11 million of the estimated funds by order of the court (App. 45, n.14).

On December 4, 1978, plaintiffs submitted the first two settlements to the district court for preliminary approval, together with affidavits and briefs containing economic and other supporting information. *All plaintiffs, including the petitioners here, joined in sponsoring those settlements at that time.* At the hearing on the two settlements, the district court deferred preliminary approval and requested the parties to furnish additional and more detailed economic data by which to judge the reasonableness of the settlements. By the time the additional economic data had been gathered the remaining settlements had been reached (Brief of Class Plaintiffs-Appellees at 9). On April 16, 1979, all of the settlements which are the subject of this petition were submitted to the court for preliminary approval (App. 45).

C. Preliminary Approval by District Court

In support of the motion for approval, plaintiffs and settling defendants submitted voluminous evidentiary material, including the additional economic data requested by the court and a detailed description of the settlement negotiations. The court held a hearing on May 16, 1979, and on May 30 it granted preliminary approval to the settlements (App. 46). *In re Corrugated Container Antitrust Litigation,* 1979-1 Trade Cas. (CCH) ¶ 62,690 (1979).

Pursuant to the order granting preliminary approval, notice of the pendency of the class action and the terms of the proposed settlements was sent out to almost 200,000 class members. Only 210 members elected to opt out of the class (App. 9).

D. Final Approval by District Court

On December 3 and 4, 1979, the district court conducted a two-day evidentiary hearing on final approval of the settlements (App. 46). The small number of class members who mounted objections consisted of the following three groups: a few members of the container purchaser subclass, one of them a class representative, who are the petitioners here; a small group of members of the sheet plant subclass; and a group of plaintiffs who had filed an antitrust action in South Carolina and objected to settlement provisions releasing state law claims (App. 45-47).*

Among the grounds for objection in the district court were the three which are being raised in this petition: that the settlements were allegedly tainted by the conflicts of

---

* Some settling defendants also raised objections. Neither the settling defendants nor the sheet plant objectors have petitioned this Court for review.

The plaintiffs in the South Carolina action, however, recently sought review in this Court of the district court's order, affirmed by the Court of Appeals, enjoining them from prosecuting the South Carolina action. This Court denied their petition for writ of certiorari on April 19, 1982. *Three J Farms, Inc.* v. *Plaintiffs' Steering Committee,* No. 81-1391. Notwithstanding such denial they have filed a cross-petition in this proceeding seeking review of the settlements, but only with respect to the provisions releasing state claims. For the reasons outlined below, and for the further reason that releases of state law claims in class action settlements have consistently been approved as reasonable and customary, *e.g., McDonald* v. *Chicago Milwaukee Corp.,* 565 F.2d 416, 435 (7th Cir. 1977); Cf. *Abramson* v. *Pennwood Investment Corp.,* 392 F.2d 759, 762 (2d Cir. 1968), such an attack on the district court's findings concerning the adequacy of the settlements does not merit this Court's review.

interest among the plaintiffs' negotiating attorneys; that the district court overestimated plaintiffs' litigation risks; and that the methodology employed by plaintiffs-proponents' economic expert was defective (App. 45-47).*

The objectors submitted affidavits and memoranda to supplement the material previously offered in opposition to the motion for preliminary approval (App. 9). Proponents' economic expert testified and was extensively cross-examined by counsel for the objectors (App. 9). In addition, counsel for the container purchaser objectors—petitioners here—requested and were given the opportunity to cross-examine two of the attorneys for the sheet plant subclass representatives with respect to purported conflicts of interest in the settlement negotiation process (App. 11).

After consideration of all the evidence, the district court entered an order on December 21, 1979, finally approving the settlements (App. 6-23). In response to the conflict of interest objection, the court found that while there were "undeniably some differences between sheet plants and container purchasers . . . [t]he fact is that the funds were acquired pursuant to the entirely common goal of achieving the highest amount possible" (App. 13, 15). In sum, the court could find no "impropriety or even a superficial appearance of impropriety" (App. 15). The court noted that the conflict of interest issue appeared to have surfaced as a result of a struggle within the Steering Committee itself and suggested that "where in fact the only conflict of interest is a conflict of attorneys' interests, the court also

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* Petitioners' attack on the proponents' expert is addressed in the Brief of the Respondents-Plaintiffs in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (at 22-24). Settling defendants-respondents adopt and rely on plaintiffs' brief in that respect, and have specifically addressed only the other two issues raised by the petitioners.

has a duty to ensure that class members do not suffer" (App. 16).

The court further approved the allocation of funds between the sheet plant and container purchaser subclasses (App. 21-22) and found, on the basis of all the evidence before it, that the settlements were conducted at arms length (App. 10), and were fair, reasonable and adequate (App. 22). These findings were based on the court's extensive oversight of the class action case, its exposure to the evidence in the criminal case, and its review of the evidence (particularly the testimony of the sheet plant attorneys) presented by the proponents and the objectors. The objectors appealed this decision to the Fifth Circuit Court of Appeals.

E. First Review by Court of Appeals

With respect to the conflict of interest claim, the Court of Appeals held that, even assuming there was a possibility that the interests of the two subclasses might have diverged at some later point in the litigation, at the time that the negotiations were taking place they shared an overriding common interest in securing the maximum possible recovery (App. 49-54). The Court of Appeals further pointed out that eleven of the settlements were negotiated after the district court's designation of subclasses, by which time the Steering Committee represented only the interests of the container purchaser subclass (App. 54-56).

The Court of Appeals rejected the contention that the settlements should be upset because they had been negotiated prior to any formal discovery, noting that the Steering Committee had access to a wide range of information which considerably aided its evaluation of plaintiffs' likelihood of success, including: the indictments filed in the criminal case, documents produced by defendants to the Houston grand jury, extensive memoranda and affidavits submitted

by defendants in response to plaintiffs' class action motion, trade association statistics, Arthur Andersen & Co. reports relating to the corrugated products industry, the opinion and record in *United States* v. *Container Corporation of America,* 393 U.S. 333 (1969), and the opinion in *United States* v. *Consolidated Packaging Corporation,* 575 F.2d 117 (7th Cir. 1978) (App. 57).

With respect to the district court's assessment of the adequacy of the settlements, the Court of Appeals remanded for further findings. The court laid out the following three-step process for passing on the adequacy of a class action settlement:

> First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate. (App. 60)

Concerning the range of possible recovery, the Court of Appeals held that the district court had failed to explain the reasons behind its damage estimate (App. 62-67). With respect to the district court's evaluation of the risks of litigation, the court held that while "the district court said enough . . . it certainly could and probably should have said considerably more" (App. 69). Finally, the court concluded that "the court's findings on factors other than possible recovery and the likelihood of success were not detailed enough for us to review" (App. 71). The Court of Appeals retained jurisdiction of the appeal pending the district court's

compliance with the limited remand for further fact-finding (App. 87).

F. Decision of District Court on Remand

On June 4, 1981, pursuant to the Court of Appeals' remand, the district court entered 70 pages of further detailed findings of fact in support of its approval of the settlements (App. 90-160).

The district court separately assessed the evidence with respect to each element of plaintiffs' claims: violation, impact and damages. It reviewed, among other things, extensive economic evidence submitted by both proponents and objectors concerning all three elements. The court found that:

> Sufficient facts have been developed in discovery, in the affidavits and other materials submitted to the court on the class action motions and on the motions for preliminary and final approval of these settlements, in the presentence proceedings for those thirty defendants in the criminal case who pled *nolo contendere,* and as a result of the trial of the criminal case, to permit an evaluation of the risks plaintiffs would face. (App. 94)

It concluded, on the basis of those facts, that the plaintiffs would run a number of risks in litigation and that the settlements were fair, reasonable and adequate in light of those risks. In addition, the court assessed the adequacy of each defendant's settlement individually, and approved them on that basis as well (App. 121-152).

G. Second Review by Court of Appeals

Following the entry of the district court's supplemental findings, all parties submitted further briefs to the Court of Appeals, which had retained jurisdiction of the appeal. The

Court of Appeals reviewed and affirmed the district court's findings (App. 161-177). The court found that the district court had "made added findings on or evaluations of each issue and factor we requested" (App. 168). With respect to the damage estimate, the Court of Appeals found that the district court had adequately justified its reliance on the proponents' expert; the court noted that appellate review of that estimate was limited by its necessary reliance on the district court's determination concerning the credibility of the expert witnesses (App. 170-171). The Court of Appeals found that the district court's findings concerning the likelihood that plaintiffs would prevail at trial were "clear enough to support its exercise of discretion to approve the settlements" (App. 172), and that it had "satisfactorily explained its reliance on various other factors" underlying its approval of the settlements (App. 173).

The instant petition has been filed by only one of the original several groups of objectors—a group of dissident container purchasers who are now and have always been represented by the Steering Committee, and whose interests have been fully represented at every stage of settlement negotiations. The objections of other dissident groups have been finally resolved by over two years of litigation and five judicial opinions supporting the settlement agreements.

Reasons for Denying the Writ

Petitioners have pointed to no special and important reasons for reviewing the Court of Appeals' approval of these settlements. The petition constitutes nothing more than an attack on the findings of the district court—findings which were documented in great detail and were twice reviewed by the Court of Appeals. These findings were well within the district court's discretion.

The district court assessed both the strengths and weaknesses of plaintiffs' case and gave appropriate weight to defendants' acquittal in the criminal case. It also found, on the basis of its close supervision of the conduct of negotiations in the class action case, that no conflicts of interest existed between the plaintiff subclasses as to such negotiations.

The petition herein does not present any basis for the grant of the writ of certiorari. The decisions of the Court of Appeals were not in conflict with the decisions of this Court or any other federal court; did not involve an important question of federal law which has not been but should be settled by this Court; and did not depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court. The issues decided below do not require exercise of this Court's power of supervision. Accordingly, the findings entered by the district court and affirmed by the Court of Appeals are not an appropriate subject for review on a writ of certiorari.

I.

The District Court's Detailed Assessment of Plaintiffs' Likelihood of Prevailing at Trial, and the Court of Appeals' Affirmance, Fully Satisfied Standards of Judicial Review of Class Action Settlements.

Petitioners challenge the district court's finding that the settlements were fair, reasonable and adequate on the grounds that the district court gave undue weight to the weaknesses of plaintiffs' case and to the acquittals in the related criminal cases. Neither argument raises an important federal question for this Court's review. The district court's opinion on its face gives appropriate weight to

the strengths and weaknesses of plaintiffs' case, including the criminal acquittals.

In its decision remanding the settlements to the district court, the Court of Appeals recognized as "general ground rules" established by the case law, that:

> "The settlement terms should be compared with the likely rewards the class would have received following a successful trial." *Cotton* v. *Hinton*, 559 F.2d at 1330. And: "the strength of the case for plaintiffs [must be] balanced against the amount offered in settlement." (citations omitted) (App. 59)

Because it found that the district court's evaluation of the settlements was not particularized enough to satisfy these ground rules, the Court of Appeals remanded for further fact-finding (App. 61).

In response to the Court of Appeals' remand, the district court entered 20 pages of detailed findings directed to the issue of the likelihood of plaintiffs' success on the merits.* The court separately assessed plaintiffs' ability to prove each of the three essential elements of an antitrust case: violation, impact and damages. With respect to violation and impact, the court cited evidence that some corrugated industry employees had exchanged and honored prices (App. 94-95). The court then reviewed and analyzed evidence concerning the localized, fragmented nature of the corrugated industry, its market share structure, its barriers to entry and the customized nature of the corrugated box product, and found that plaintiffs would experience some difficulty establishing a nationwide conspiracy with impact on the entire class (App. 95-102). With respect to damages, the

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* The district court's complete opinion, which runs 70 pages, includes discussion of a number of other settlement issues which have not been raised in the petition before this Court (App. 115-160).

court made a comparison of the methodologies utilized by the economic experts offered by the two plaintiff groups—the plaintiff proponents and the plaintiff objectors (App. 102-111). (The settling defendants did not offer any economic evidence with respect to damages.) The court found the proponents' expert's damage estimate more reliable and noted that the objectors' expert's methodology would have yielded a similar estimate if properly applied to a conspiracy period more consistent with the evidence before the district court (App. 109-110). The court assessed plaintiffs' chances of recovering for the pre-limitations period by establishing fraudulent concealment, and found them to be "comparatively slight" (App. 114). It also found a risk that the class might not be certified (as to the pre-certification settlements) and a risk that legislation overruling this Court's decisions in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) might provide the defendants with a "passing-on" defense which could have jeopardized the recovery of the class members, all of whom were direct purchasers (App. 94).

The Court of Appeals affirmed these findings in all respects. It deferred to the district court's evaluations of credibility and greater familiarity with the evidence, holding that the district court complied with the remand instructions and that its findings were well within its discretion (App. 165). That deference was fully consistent with the standards applied by courts of appeals in other circuits in class action settlement approval cases. *See e.g., Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir), *cert. denied*, 423 U.S. 864 (1975), *citing Ace Heating and Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971) (according great weight to the views of the trial judge "because he is exposed to the litigants, and their strategies,

positions and proofs" and "is aware of the expense and possible legal bars to success").

Petitioners have not identified and could not identify any respect in which the standards for judicial review of settlements set forth by the Court of Appeals conflict with those enunciated by this or any other federal court, nor any respect in which the district court's decision departs from those standards, calling for an exercise of this Court's power of supervision.

Petitioners contend that the district court failed to evaluate the strength of plaintiffs' case and concentrated instead on its weaknesses. This contention ignores the premise on which the district court's entire discussion of the merits is based and which is clearly articulated at the beginning of that discussion, the premise that there was some evidence of price communications in the industry (App. 94-95). Having recognized this aspect of plaintiffs' case, the court quite properly went on to consider the obstacles plaintiffs would be likely to encounter. Whether or not the district court achieved a perfect balance in evaluating plaintiffs' strengths and weaknesses on the merits is not the kind of important question of federal law which this Court should be called on to consider.

Moreover, in its discussion of damages, the district court evaluated and compared both the plaintiff proponents' and plaintiff objectors' experts. In light of the magnitude of the damage forecast offered by the plaintiff proponents' expert—between $169 and $524 million (App. 106-107)—it is ludicrous to assert that the court's acceptance of that estimate ignored the inherent strength of plaintiffs' case.

Petitioners also contend that the district court gave undue weight to the criminal acquittals, thereby ignoring the different standards of proof in civil and criminal cases. Noth-

ing in the record, however, suggests that the district court placed excessive importance on the acquittals; it is quite clear from the lengthy findings that the outcome of the criminal case was only one of a myriad of factors which the court took into consideration. As the Court of Appeals noted, the district court drew from the acquittals "only a single inference: 'ultimate success is by no means assured' " —an inference perfectly consistent with the dictates of the Manual for Complex Litigation, section 1.46 (App. 68). Indeed, the district court expressly found that evidence of price communications in the industry was "the strongest element of plaintiffs' case" notwithstanding the criminal jury's failure to believe that evidence (App. 95).

This Court has rarely granted certiorari "to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), particularly when the facts have been concurrently found by both courts below, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Petitioners' challenge to the standards used by the district court is nothing more than a veiled attack on that court's factual determinations that the plaintiffs faced substantial litigation risks. Those findings were well within the district court's discretion and were approved by a Court of Appeals which had declined to "rubberstamp" earlier, less detailed findings. Accordingly, they are not an appropriate subject for this Court's exercise of its extraordinary powers of review.

II.

The District Court's Finding That the Settlements Were Not Tainted by a Conflict of Interest, Affirmed by the Court of Appeals, Was Consistent With Due Process and Ethical Standards.

Petitioners attack the district court's finding, affirmed by the Court of Appeals, that all class members were adequately represented during the negotiation of the settlements. They contend that the standard used by the Court of Appeals in reviewing that finding constituted both a violation of petitioners' due process rights and an abdication of its responsibility to monitor the ethical propriety of counsel practicing before it.

Neither of these contentions raises an issue appropriate for this Court's review. The Court of Appeals applied recognized standards of law in upholding the district court's finding that no conflict existed as to the settlement negotiations. Moreover, with respect to the settlements negotiated following the designation of the two subclasses the record establishes that no such conflict could have existed.

The Court of Appeals set out the following guidelines for determining whether settlement negotiations are tainted by a conflict of interest:

> Recognizing that the allegedly differing interests of the two subclasses might have conflicted at some point in the litigation, we think the question before the district court was whether these interests conflicted at the point of settlement negotiation, and thus deprived either class of the vigorous and unqualified advocacy in settlement negotiations to which both were entitled. In deciding whether the settlements resulted from proper advocacy, we must

> inquire, first, whether the general interests of the subclasses respecting the settlements were the same and amenable to being achieved by unified representation; and, second, whether any specific features of the settlement sacrificed the interests of one class in favor of the interests of the other. (App. 51)

The Court of Appeals sustained the district court's finding, based on testimony by attorneys involved in the negotiation and on its own supervision of the lawsuit, that the class members shared a common settlement goal: to maximize the recovery for the entire class (App. 51).

The Court of Appeals explicitly recognized that all class members are entitled to "adequate representation," that is, representation which has not been vitiated by a conflict of interest on the part of the attorneys for the class. Since none of the decisions cited by petitioners stand for a different proposition it is impossible to detect any conflict between them and the Court of Appeals' decision.*

The petitioners challenge that aspect of the Court of Appeals' decision which holds that, for the purpose of approving a settlement, it is the existence of an actual conflict of interest concerning the objectives of settlement negotiation which is controlling, and not the potential for conflict at some later stage of the litigation. The requirement that there be an actual conflict impacting on settlement is in harmony rather than in conflict with other decisions in which the issue has arisen. *See, In re Chicken Antitrust*

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* Petitioners' contention that the Court of Appeals substituted a "substantial compensation" for the "adequate representation" standard of the case law is a transparent sleight of hand. The court identified "substantial compensation" not as a substitute standard of due process but rather as the goal which united the subclasses at the time of settlement thereby assuring "adequate representation" (App. 51).

Litigation American Poultry, 669 F.2d 228, 236-37 (5th Cir. 1982); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1131-32 (7th Cir.), *cert. denied sub nom. Oswald* v. *General Motors Corp.*, 444 U.S. 870 (1979); *Reynolds* v. *National Football League*, 584 F.2d 280, 285-87 (8th Cir. 1978). The *General Motors* case, heavily relied on by petitioners here, instead supports the proposition for which it was cited by the Court of Appeals (App. 50): that a settlement may be upheld "if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement itself is fair." *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d at 1131-32.

The other cases cited by petitioners involve class certification rather than settlement approval decisions.* In deciding whether to certify a class, the court must evaluate the typicality of the claims of the class representatives and the adequacy of their representation as those factors can be anticipated to develop throughout the course of the litigation. Accordingly, it must look to the future and speculate as to how class counsel and named plaintiffs will represent the class. In evaluating the adequacy of a settlement, by contrast, there is no reason for the court to involve itself in such projections; its primary concern is with the fairness of events which have already taken place. If at the time the settlements were negotiated all plaintiffs were working toward a common goal, hypothetical future conflicts will not impact on the fairness of the settlement.

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* One of the cases cited by petitioners, *Clark* v. *Lomas & Nettleton Financial Corp.*, 625 F.2d 49 (5th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981), is inapposite for other reasons. In *Clark* a derivative suit was settled by a Board of Directors controlled by the alleged wrongdoers. In that case the conflicting interests represented by the Board—those of plaintiffs and defendant—were by definition antagonistic from the inception of the suit. By contrast, the interests of the co-plaintiffs in this suit were not divergent (App. 15).

Petitioners ignore that distinction when they argue that a conflict existed between the subclasses by virtue of the possibility that some sheet plant plaintiffs might have been implicated in the alleged price-fixing conspiracy. Even if such a conflict might have surfaced at the time of trial, or possibly during the course of formal discovery—which it did not—petitioners have not identified any respect in which it would have created conflicting goals for attorneys seeking to maximize the settlement recoveries of both subclasses. They have not pointed to any facts which cast doubt on the district court's finding, supported by the Court of Appeals, that "the funds were acquired pursuant to the entirely common goal of achieving the highest amount possible" (App. 15).

While petitioners' challenge to all the settlement agreements fails for these reasons, their position with respect to the settlements negotiated after the designation of subclasses is particularly incomprehensible. Those settlements were negotiated by the Steering Committee solely on behalf of the container purchasers. The sheet plant allocation was included at the insistence of defendants, who would not negotiate on any other terms, and not, as the petitioners suggest, out of some misguided belief on the part of the Steering Committee that it was bound to protect the interests of the sheet plant subclass. The allocation was contingent on election by the sheet plant subclass to participate in the settlement, with the approval of the court (App. 44-45). Accordingly, petitioners' contentions with respect to the settlements entered into after December 26, 1978 are totally without foundation in the record.

It is interesting to note that the sheet plant allocation was challenged in the courts below by *both* the sheet plant and container purchaser subclasses; the former group contended that the allocation to the sheet plants was inade-

quate, while the latter group contended that it was excessive. Petitioners' challenge here is to the allocation of funds between two groups, and not to the adequacy of the settlements overall. The issue this Court is being asked to review simply involves bickering between the parties over their respective shares of a common fund, and does not raise due process questions or any other important questions of federal law.

Petitioners' statement that counsel for the Steering Committee had a "*sub rosa*" agreement with the settling defendants waiving the rights of the container purchaser subclass to oppose participation by the sheet plants is unsupported by the record and is simply false. Settling defendants were never parties to any such agreement.

The courts below did not violate petitioners' due process rights or sanction any ethical impropriety. The standard applied by the district court and the Court of Appeals was consistent with that applied by other federal courts, and the district court's finding that no conflict of interest tainted the settlements is not an appropriate subject for this Court's review.

CONCLUSION

Petitioners have not identified any conflict between the law as set forth by this Court or other lower federal courts and the decisions of the Court of Appeals below that: (1) the settlements were fair, reasonable and adequate in light of the risks which plaintiffs would encounter in litigation and (2) conflicts of interest did not infect the proceedings leading to the 22 settlements at issue. Petitioners' arguments are no more than a challenge to factual findings which are amply supported by the record below.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: May 10, 1982

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Appendix

APPENDIX

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Settling Defendants-Respondents on whose behalf this Brief is filed provide the following information about their respective parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Alton Packaging Corporation

Alton Packaging Corporation (formerly Alton Box Board Company) is a wholly owned subsidiary of Jefferson Smurfit Incorporated, which is a wholly owned subsidiary of Jefferson Smurfit Group, Inc.

Boise Cascade Corporation

Subsidiaries and Affiliates: Boise Cascade Timberlands-Southeast; Boise Cascade Timberlands of Oregon; Boise Cascade Southern Company; Cuban Electric Company; Duropack Wellpappe Gmbh.; Cartonex Verpackungs Agentur Gmbh.; Anderoscoggin Reservoir Co.; D.S. Investment; Columbia Associate (Ltd.).

Champion International Corporation
(including Hoerner Waldorf Corporation)

Subsidiaries: Weldwood of Canada, Limited; Papel e Celulose, S.A.; Industrias Madereras De Loreto, S.A.; Setter GmbH.

Container Corporation of America

Container Corporation of America is a wholly-owned subsidiary of Mobil Corporation.

Subsidiaries: T.R. Miller Mill Company; Carton De Columbia, S.A., Carton De Venezuela, S.A.; Cartones Nationales, S.A.; Corrugadora De Carton, S.A.; Cartoenrases Valencia, S.A.; Union Grafica, S.A.; Molinos de Carton Y Papel, C.A.

The Continental Group, Inc.

Subsidiaries: Nihon Harrison Ltd.; National Cup & Container Co., Ltd.; Envolturas Industriales, S.A.; Shellmar de Columbia, S.A.; Convertidoras Venezolana de Papel, C.A.; Peachtree Generating Corp.; Fibro Tambor S.A. de C.V.; Braskraft S.A. Florestal c Industrial; The Vinoxen Company, Inc.; Containers Limited; Envases Generales Continental de Mexico, S.A.; Kuwait Metal Container Company, Ltd.; Continental Can Hong Kong, Limited; Continental Can Saudi Arabia, Ltd.; Doosan Continental Can Manufacturing Co., Ltd.; Fabricana Boliviana de Encases Socieded Anonima; Industrias del Norte, S.A.; Continental Produtos Metalurgicos Ltda.; Metalurgica Matarazzo S.A.; Matcan Embalagens Ltda.; Mill Paper Fibres Limited; Schmalbach-Lubeca GMBH; Elbatainer France; Elbatainer (U.K.) Ltd.; Ets Schuybroek S.A.; Sobemi N.V.; Verblifa N.V.; De Clerck N.V.; Societe Pour le Developpment et L'Expansion D'Enterprises (SDE); The Life Insurance Company of Virginia; Lawyers Title of Arizona; Ontario Title Insurance Agency; Long & Melone, Ltd.; Sentinel Escrow, Ltd.; Lawyers Title Company of Idaho; St. Francis County Abstract Company, Inc.; Lawyers Abstract Corporation; Lawyers Abstract Company; Bayport General Agency, Inc.; Supron Energy Corpo-

ration (tender offer now pending); Dominguez Continental, S.A.

Diamond International Corporation

Subsidiaries: E.W.M. Corporation; Groveton Paperboard Inc.; Ital-Pacspa.

Inland Container Corporation

Inland Container Corporation is a wholly owned subsidiary of Time, Inc.

Subsidiaries of Inland Container Corporation or one of its subsidiaries: Papelera de Canarias, S.A.; Georgia Kraft Company; Adelphi Land Investments, Ltd.; Harima M.I.D., Inc.; Primus Investors, Ltd.; JLW III; Owens-Illinois de Puerto Rico.

International Paper Company

Subsidiaries and Affiliates: Indian River Company; Envases Internacional S.A.; IPI Corporation; Arizona Chemical Company; Arizona Chemical Overseas Corporation; Arizona Chemical Service Corp.; Cargal Limited; I.M.I. Industrial Management and Investment Company Limited; Siron Trading Co. Ltd.; Productora de Papeles S.A. "PROPAL"; Sicilcartone S.r.l.; Socosic S.r.l. (in liquidation).

MacMillan Bloedel Ltd.

MacMillan Bloedel Ltd. is the parent company of Defendants-Respondents MacMillan Bloedel, Inc.; MacMillan Bloedel Containers, Inc., and MacMillan Bloedel Packaging, Inc.

Appendix

Menasha Corporation

Subsidiary: New England Woodenware Company.

Olinkraft, Inc. (presently Manville Forest Products Corporation)

Parent: Johns-Manville Corporation.

Owen-Illinois, Inc.

Subsidiaries and Affiliates: Duradrum Corporation; Manufacturera de Vidrious Planos, C.A.; Fabrica de Vidric Los Andes, C.A.; Emballages Laurent, S.A.; Papeteries d'Espaly, S.A.R.L.; Durobor, S.A.; Compagnie Francais d'Expansion Verriere, SRL; Deutsche Durobor, G.m.b.H.; Durobor Italiana, S.p.A.; Interglas, B.V.; Gerresheimer Glas, A.G.; Bramlage G.m.b.H.; Gerro Plastic G.m.b.H.; Glashutte Budenheim G.m.b.H.; Gemeinnutzige Wohnungsbaugesellschaft Budenheim G.m.b.H.; Spessarter Rohlglaswerke G.m.b.H.; Verpackungs-Industrie Kutenholz G.m.b.H.; Gebr. Stoevesandt K.G.a.A.; Gerresheimer Wohnungsbaugesellschaft m.b.H.; GWW Gessleschaft fur Werbeberatung und Werbemittlung m.b.H.; INAS Industria-Assekuranz-Vermittlungagesellshaft m.b.H.; Gerro-Kaiser Aluminim Dosenwerk G.m.b.H.; Gerro-Kaiser Aluminim Dosenwerk G.m.b.H. & Co. (2); Companhia Industrial Sao Paulo e Rio; Industria de Laticinious de Natal, S.A.; Industria de Laticinious de Campina Grande, S.A.; Industria de Azulejos de Bahia, S.A.; Owens-Illinois de Puerto Rico (4); P.T. Igar Jaya; Cristaleria Peldar, S.A.; Industrial de Vidrio Plano, S.A.; Metalicas Peldar, S.A.; Industrial de

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St. Joe Paper Company

Subsidiaries: Florida East Coast Railway; Talisman Sugar Corp.; Jacksonville Properties, Inc.; New England Container Company; General Die Corp.; Holiday Inns of Northern Ireland, Ltd.; Holiday Motels, Ltd. (Ireland).

St. Regis Paper Company

Affiliates: Angelina & Neches River Railroad Company; Sylvachem Corporation.

Stone Container Corporation

Subsidiaries: Sierra Pacific Container Corporation; Trans-Seal Corporation; Dean-Dempsey Corporation; L & M Corrugated Container Corporation.

Union Camp Corporation

Affiliates: Cargal Limited; Cartonajes Union, S.A.; Union Camp Ireland Ltd.; Precis 40-9 Ltd.; Recor Corp.; Inglett & Company.

U.S. Corrugated Fibre-Box Company

U.S. Corrugated Fibre-Box Company is a wholly owned subsidiary of Lacy Diversified Industries, Inc.

Affiliates: U.S. Corrugated of Alabama, Inc.; U.S. Packaging Service, Inc.

Appendix

Weyerhaeuser Company

Subsidiaries and Affiliates: Camac Veneer, Inc.; Mountain Tree Farm Co.; North Pacific Paper Corp.; Shemin Nurseries, Inc.; Weyerhaeuser International, Inc.; de Bes' Insurance, Ltd.; Forest Insurance, Ltd.; Kennedy Bay Timber Sendirian Berhad; Silam Forest Products Sendirian Berhad; Pacific Hardwoods Sendirian Berhad; Weyerhaeuser Europe, S.A.; Cornerstone Development Co.

Opposition

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ALEX

No. 81-1820

IN THE

Supreme Court of the United States

October Term, 1981

CFS CONTINENTAL, INC., et al.

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

BRIEF FOR THE RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Faced with conflicting interests of two subclasses in conducting settlement negotiations, did the lower courts, contrary to the class action "adequate representation" due process requirement enunciated by this Court in *Hansberry* v. *Lee,* 311 U. S. 32 (1940) and in the decisions of the Third, Seventh and District of Columbia Circuits, apply incorrect and grossly inadequate due process standards in approving the settlements in this litigation?

II.

Did the approval by the lower courts of settlements in this litigation negotiated by counsel in conflict of interest positions and with divided loyalties create such an appearance of impropriety as to require the exercise by this Court of its supervisory powers to structure and control ethical practice and procedure before the federal courts?

III.

Did the District Court, contrary to the decisions of this Court and other Circuits, abuse its discretion to the detriment of class members in approving the settlements in this litigation based on the application to the evidence available for review of incorrect criteria of law for determining whether settlements are fair, reasonable and adequate?

IV.

Where the District Court's decision that the settlements in this litigation are fair, reasonable and adequate is based on the application of incorrect criteria of law, did the Court of Appeals, contrary to prior decisions of the Fifth Circuit and decisions in the Third, Seventh and Tenth Circuits, improperly limit the scope of appellate review to the narrow review which applies to the exercise of discretion and thereby fail to exercise its independent judgment in reviewing as a matter of law the application of incorrect criteria of law to the evidentiary facts?

PARTIES

Because of the large number of parties to this nationwide class action price fixing litigation, all parties to the proceedings in *In Re: Corrugated Container Antitrust Litigation,* MDL Docket No. 310, in the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit whose judgments are sought to be reviewed are set forth in the Appendix (hereinafter "App.") to this Petition at App. pp. A1-A5.

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The memorandum and order of the United States District Court for the Southern District of Texas approving class action settlements is reported at 1980-1 Trade Cases (CCH) ¶ 63,163. The opinion of the Fifth Circuit affirming in part and remanding in part is reported at 643 F. 2d 195. Additional findings of fact filed after remand to the Southern District of Texas are reported at 1981-1 Trade Cases (CCH) ¶ 64,114. The opinion of the Fifth Circuit affirming the order of the Southern District of Texas after remand is reported at 659 F. 2d 1322.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28, U. S. C. § 1254(1). An opinion of a panel of the United States Court of Appeals for the Fifth Circuit in this case was filed on April 3, 1981 affirming certain portions of the order of the District Court, remanding other portions for further proceedings, and retaining jurisdiction over the appeal pending compliance by the District Court with its limited remand. Thereafter, a second opinion was filed by the Fifth Circuit on October 29, 1981. A petition for rehearing was timely filed and denied on November 30, 1981. A motion for an extension of time in which to file this petition up to and including March 31, 1982 was granted on February 23, 1982 by order of Mr. Justice White.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Fifth Amendment of the United States Constitution provides:

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sherman Act, Section 1 (Title 15, U. S. C. § 1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

3. The Clayton Act, Section 4 (Title 15, U. S. C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

4. Rule 23 of the Federal Rules of Civil Procedure provides in relevant part:

> "(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

IN RE:
CORRUGATED CONTAINER ANTITRUST LITIGATION
MDL Docket No. 310

CFS CONTINENTAL, INC.; HAROLD FREUND BAKING CO. OF SAN JOSE; HAROLD FREUND BAKING CO. OF FLORIDA; HAROLD FREUND BAKING CO. OF HAWAII, INC.; BARG & FOSTER, INC.; MELSTER CANDIES, INC.; ALLIED VAN LINES, INC.; and WITTEK GOLF SUPPLY CO., INC.,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

All of the actions which are the subject of the instant petition were originally commenced on behalf of a class of purchasers of corrugated containers, alleging violations of Section 1 of the Sherman Act (Title 15, U. S. C. § 1). Subsequent to the consolidation of all of these national class actions, an additional single action was filed on behalf of a class of container purchasers and sheet plants.[1] Such actions were

[1] A sheet plant is a company which purchases corrugated sheets from corrugated manufacturers, including the defendants herein, and then converts such sheets into corrugated containers. The sheet plants then sell the containers in competition with the defendants and other integrated container manufacturers to container purchaser class members who are their co-plaintiffs.

brought under Section 4 of the Clayton Act (Title 15, U. S. C. § 15). The jurisdiction of the District Court was based on its original jurisdiction under Title 15, U. S. C. § 1337.

These actions were consolidated by the Judicial Panel for Multidistrict Litigation in the Southern District of Texas in November 1977. On December 6, 1977, the District Court ordered the formation of a plaintiffs' Steering Committee consisting of 13 members. The members of the Steering Committee all represented container purchasers.

Following consolidation of all of the cases by the Judicial Panel and the formation of the Steering Committee, another action was filed against the defendants on behalf of container purchasers (I. Kaplan, Inc. and Mid-Valley Packaging Company) and one sheet plant (Atlas Container).

In January of 1978 government misdemeanor and felony indictments were returned against certain defendants herein alleging a conspiracy to fix the prices of corrugated containers and sheets during the relevant period. Following the indictments, the Steering Committee directed all plaintiffs to amend their pleadings in a Unified and Consolidated Complaint on behalf of both container purchasers and sheet plants, despite a recommendation by a Steering Committee subcommittee on March 7, 1978 that separate classes be sought in view of inherent conflicts of interest between the two groups and the need for separate representation.

In March 1978, the plaintiffs in forty of the pending cases filed a Unified and Consolidated Complaint (App. pp. A185-A199) on behalf of a class of container purchasers and sheet plants. A motion for class certification seeking a single class of container purchasers and sheet plants was thereafter presented to the Court.

Thereafter, the Steering Committee selected an "Ad hoc Settlement Committee" to meet with the defendants regarding any offers of settlement they might make. The members of the Ad hoc Settlement Committee all represented container purchasers.

On July 28, 1978, another action was filed against the defendants by two sheet plants (Great Northern Packaging Corp. and Huron Packaging Corp.) on behalf of all sheet plants in the United States.

Pursuant to settlement negotiations conducted by counsel representing only container purchasers, the Steering Committee entered into two settlement agreements (the St. Regis Paper Company and International Paper Company settlements) for both container purchasers and sheet plants in July and August of 1978. At the time of these settlements, certain objectors notified the Steering Committee that the settlements were both inadequate and involved conflicts of interest.

The District Court on September 6, 1978 certified a unitary class consisting of all container purchasers and sheet plants in the United States.

On October 12, 1978, two sheet plant plaintiffs (Great Northern Packaging Corp. and Huron Packaging Corp.) filed a motion to clarify or, alternatively, to amend the Court's class certification order, so as to create a separate class of sheet plants. This motion was supported by the uncontroverted affidavit of the president of one sheet plant, Great Northern Packaging Corp., where he stated that "container purchasers cannot adequately and properly represent sheet plants" and that "sheet plants have no interest in proving a conspiracy by the integrated companies to fix the prices of containers." (App. pp. A200-A203)

Notwithstanding the pending motion to create a separate sheet plant class and the uncontroverted affidavit, the District Court, on October 26, 1978, proceeded to appoint 12 container purchasers and a single sheet plant (Atlas Container) to *jointly* represent both the container purchasers and sheet plants encompassed within the unitary class which it had previously certified.

At the time of the appointment of the Atlas Container sheet plant as one of 13 class representatives of the unitary class, its counsel was himself in a conflict position by virtue of his representation of both container purchaser (I. Kaplan, Inc. and Mid-Valley Packing Co.) and sheet plant (Atlas Container) clients with significantly diverse and conflicting interests. Atlas Container's counsel did not cease representation of his container purchaser clients until March 1, 1979. See *Notice of Withdrawal and Substitution of Counsel,* and Order therein, entered March 1, 1979. (Docket No. 507)

In November 1978, plaintiffs submitted to the District Court an agreed order creating a sheet class subclass. Notwithstanding his own conflict of interest, Atlas Container's counsel at a December 14, 1978 pretrial conference conceded the conflicts of interest between container purchasers and sheet plants,[2] arguing in favor of the creation of a separate sheet plant subclass with "independent counsel". (App. pp. A205-A207) At that hearing, the Court indicated its intention to create a separate sheet plant subclass and appoint Atlas Container and Great Northern Packaging Corp. as co-representatives thereof. (App. pp. A207-A208) An order was entered by the District Court on December 26, 1978 establishing two subclasses, a container purchaser subclass and a sheet plant subclass.

The inherent conflicts of interest which existed between container purchasers and sheet plants were repeatedly articulated by plaintiffs' counsel and recognized by the District Court. In opposing a motion of certain settling defendants to

[2] At the December 14, 1978 pretrial conference, Atlas Container's counsel stated, among other things, that the "issue of conspiracy with respect to sheet plants is somewhat different than a conspiracy with respect to containers"; that "The container plaintiffs have really no interest in determining whether or not the conspiracy also affected sheets"; and that "whether or not the conspiracy affected the price of containers has no bearing on whether or not the conspiracy affected the price of sheets." (App. pp. A205-A206)

a single class, counsel for the Atlas Container sheet plant, recognizing "the substantial difference in factual and legal issues between the two subclasses", advised the District Court on May 11, 1979 as follows:

> "[G]enuine divergence of interest, i.e., conflict clearly does exist between the two subclasses. That conflict existed when the motion for subclass certification was granted, and nothing has happened in the interim to alleviate it . . ." (App. p. A212)

The District Court on May 16, 1979 rejected settling defendants' contentions regarding the absence of conflict between container purchasers and sheet plants in denying their motion to remerge the two subclasses into a single class. See *Order Denying Motion of Defendants to Disestablish Sheet Plant Subclass* entered May 16, 1979 (Docket No. 667). Later, in granting final approval of the settlements in this litigation, the District Court stated:

> "There are undeniably some differences between sheet plants and container purchasers: sheet plants compete with the defendants in box sales, *may themselves have participated in the alleged price fixing conspiracy,* desire injunctive relief as well as damages, and may have a somewhat different measure of damages." (emphasis added)

In Re Corrugated Container Antitrust Litigation, 1980-1 Trade Cases (CCH) ¶ 63,163, p. 77,788 (S. D. Tex. 1979). (App. p. A13)

In view of the uncontradicted evidence regarding the conflicting interests between container purchasers and sheet plants, the District Court's finding that "no inherent conflict has been shown between sheet plants and container purchasers" (1980-1 Trade Cases (CCH) ¶ 63,163, p. 77,788 (S. D. Tex. 1979)) is manifestly erroneous.

Notwithstanding the significantly diverse and conflicting interests of the two subclasses in conducting settlement negotiations, nine settlements (hereinafter the "pre-January 5, 1979 settlements")[3] were negotiated in December, 1978 for both sheet plants and container purchasers by counsel for purchasers of containers, were filed after the December 14, 1978 pretrial conference, and in many instances were finalized and filed long after the entry of the District Court's order of December 26, 1978 establishing the two subclasses. Although counsel for the Atlas Container sheet plant participated in the negotiation of all or some of these nine settlements, he was himself in a conflict position throughout his participation in such negotiations by virtue of his representation of both container purchaser (I. Kaplan, Inc. and Mid-Valley Packing Co.) and sheet plant (Atlas Container) clients with diverse and conflicting interests. As a result, these nine settlements were in fact negotiated for both sheet plants and container purchasers solely by counsel for purchasers of containers. Thus, the District Court's findings that "all but the first pre-January 5, [1979] settlements were participated in by Mr. Montague, representing a sheet plant" and that "sheet plants have been represented by a sheet plant at all but the initial stages of the settlement negotiations" (1980-1 Trade Cases (CCH) ¶ 63,163, p. 77,788 (S. D. Tex. 1979)) are manifestly erroneous.

On January 5, 1979, the Steering Committee met with representatives of the sheet plant subclass, abolishing the "Ad Hoc Settlement Committee" and agreeing that all future settlements would be negotiated by representatives of both subclasses on behalf of their respective subclasses. Counsel for the sheet plant subclass requested a short delay in negotiations to gather sufficient economic and factual information to ade-

[3] The Union Camp Corporation, Boise Cascade Corporation, Chesapeake Corporation of Virginia, Diamond International Corporation, Longview Fibre Company, Dura Containers, Inc., Champion International Corporation (including Hoerner Waldorf), Menasha Corporation, and Willamette Industries (including Western Kraft East, Inc., and Corco, Inc.) settlements.

quately negotiate for their class. This request was refused by representatives of the container purchaser subclass who insisted upon commencing previously arranged settlement negotiations on January 6, 1979.

Commencing on that date, eleven settlements (hereinafter the "post-January 5, 1979 settlements")[4] were reached by counsel representing solely container purchasers for the benefit of both container purchasers and sheet plants. No attorney representing a sheet plant participated in any of the post-January 5, 1979 settlement negotiations. Each of these settlements expressly provided for an allocation of a portion of the container purchaser subclass funds to the sheet plant subclass upon application by the sheet plant subclass. The District Court on December 21, 1979 approved an allocation of $11 million of the container purchaser subclass funds to the sheet plant subclass.

On their face, the post-January 5, 1979 settlements appeared to protect the interests of the container purchaser subclass by vesting the settlement funds in the container purchasers and reserving to them the absolute right to oppose any application by the sheet plant subclass to participate and the right to contest the amount which sheet plants would receive in the event they made application to participate. However, counsel for the container purchaser subclass had a *sub rosa* agreement whereby the container purchaser subclass waived any right to oppose application by the sheet plant subclass to participate in the post-January 5, 1979 settlement funds, except to the extent that the amount reflected sales of

[4] The Container Corporation of America, Continental Group, Inc., Green Bay Packaging, Inc., Inland Container Corp., MacMillan Bloedel, Inc. (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging Ltd. and MacMillan Bloedel Limited), Olinkraft, Inc., Owens-Illinois, Inc., St. Joe Paper Company, Stone Container Corp., U. S. Corrugated Fibre Box Co., and Weyerhaeuser Company settlements.

sheets by a settling defendant in an amount greater than its sales to members of the sheet plant subclass. Further, counsel for the container purchaser subclass had an unrevealed side letter agreement with at least one defendant that in the event the sheet plant subclass declined to participate in the settlement, the amount allocated to sheet plants would remain available to apply toward any settlement or judgment in favor of the sheet plant subclass against that settling defendant. (App. pp. A255-A260)

Finally, two "hardship" settlements[5] were negotiated by representatives of the container purchaser and sheet plant subclasses on behalf of both subclasses.

The pre-January 5, 1979 settlements and the "hardship" settlements set forth a single dollar amount for both subclasses and have been allocated pursuant to court order between the two subclasses according to their claimed dollar purchases of containers and sheets, respectively, without any showing of the estimated relative damages sustained by container purchasers and sheet plants or any analysis of the relative strengths of the container purchaser and sheet plant liability cases.

The settlements in this litigation were negotiated prior to any meaningful discovery on the issues of liability and damages and prior to the development of any economic data concerning class or subclass damages.

Objections were raised to the methodology employed by the economic expert retained by proponents of the settlements. Specifically, proponents' economist prepared his damage study in support of the settlements by examining defendants' net profits—gleaned from informally received data—for a period much narrower than the spread of years charged in plaintiffs' Unified and Consolidated Complaint and the government felony indictment, which both alleged a price fixing conspiracy

[5] The Consolidated Packaging Corporation and Interstate Container Corporation settlements.

beginning in 1960 and continuing thereafter until January 25, 1978. (App. pp. A178-A184; A185-A199) Evidence contained in the transcript of the criminal trial showed that the conspiracy continued through 1976 and 1977, while proponents' economist assumed that the conspiracy ended in fact and effect before 1976, and undertook no study of damages sustained prior to 1970.

Further, the profit analysis undertaken by proponents' economist was faulty by reason of his failure to analyze defendants' actual costs absent the alleged conspiracy, the costs of any non-settling defendant, the profits or losses of any non-defendant corrugated manufacturer, whether settling defendants were high or low cost producers, or whether producers accounting for the remaining 20 percent of the corrugated market were significant market influences.

Proponents' economist considered a profit measure inferior to a price analysis when excess capacity exists in an industry. Proponents' own trial expert testified that substantial excess capacity existed in the corrugated industry during the conspiracy period.

A damage study based upon an analysis of industry prices was presented to the District Court. This damage study contained an estimate of single damages significantly higher than that presented to the Court by proponents' economist.

Rejecting the objections to the settlements, the District Court entered an order on December 21, 1979 granting final approval of the settlements and dismissing the actions against the settling defendants with prejudice. (1980-1 Trade Cases (CCH) ¶ 63,163) (App. pp. A22-A23) This order was appealed to the Fifth Circuit, which affirmed the District Court's holding that the settlement negotiators did not have conflicts of interest that rendered them inadequate representatives and that the lack of pre-settlement discovery did not invalidate the settlements. However, the Fifth Circuit remanded the case to the District Court for more detailed findings and con-

clusions—including further evidentiary hearings, if necessary—concerning the adequacy of all but the two "hardship" settlements and the reasonableness of the allocation formula for the pre-January 5, 1979 and "hardship" settlements. The Fifth Circuit retained jurisdiction over the appeal pending the District Court's compliance with the limited remand. (App. pp. A24-A87)

On June 4, 1981, the District Court filed additional findings of fact and conclusions of law without having undertaken evidentiary hearings, instead relying upon judicial notice of the pleadings, files and proceedings in this litigation, the companion criminal case, and the trial of the class case against a non-settling defendant. (1981-1 Trade Cases (CCH) ¶ 64,114) The Court also relied upon economic information regarding the corrugated industry—presented by defendants in support of the settlement figures— and certain presumptions as to the limited ability of the class to prove fraudulent concealment that would toll the statute of limitations, to gather records proving damages in the pre-limitations period, to obtain witnesses able and willing to testify at a class trial on the merits, and to prove a nationwide conspiracy in the corrugated industry.

The District Court on remand again rejected an analysis of industry price levels as a measure of damages and relied on the profit analysis of proponents' economist in estimating damages, and found that the settlements were adequate and that the allocation formula was reasonable. (App. pp. A90-A160) The Fifth Circuit reviewed the additional findings of fact and affirmed the District Court's approval of the settlements and the allocation formula. (659 F. 2d at 1329) (App. pp. A161-A177)

REASONS FOR GRANTING THE WRIT

A.

The decision of the Fifth Circuit is in conflict with the "adequate representation" due process requirement enunciated by this Court in *Hansberry* v. *Lee* and in the decisions of other Circuits. Faced with conflicting interests of two subclasses in conducting settlement negotiations, the lower courts applied incorrect and grossly inadequate due process standards in approving the settlements in this litigation.

B.

The approval by the lower courts of the settlements in this litigation, which were negotiated by counsel in conflict of interest positions and with divided loyalties, creates such an appearance of impropriety as to require the exercise by this Court of its supervisory powers to structure and control ethical practice and procedure before the federal courts.

C.

In approving the settlements and a formula for the allocation of the settlement funds, the District Court applied criteria of law for determining whether settlements are fair, reasonable and adequate in conflict with the decisions of this Court and other Circuits.

D.

With the District Court having applied incorrect criteria of law for determining whether the settlements in this litigation are fair, reasonable and adequate, the Court of Appeals, contrary to prior decisions of the Fifth Circuit and decisions in the Third, Seventh and Tenth Circuits, improperly limited the scope of appellate review to the narrow review which applies to the exercise of discretion and thereby failed to exercise its independent judgment in reviewing as a matter of law the application of incorrect criteria of law to the evidentiary facts.

A. The Fifth Circuit's Decision Is in Conflict with the "Adequate Representation" Due Process Decisions of This Court and Other Circuits

In the seminal decision of *Hansberry* v. *Lee,* 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940), this Court set forth the test for determining whether absent class members have been afforded due process where class representatives have interests which are hostile to some or all the interests they purport to represent, as follows:

> ". . . a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requirements." (311 U. S. at 44-45)

The Circuit Courts have uniformly held that class representatives stand in a fiduciary relationship to absent class members with respect to fundamental litigation decisions and that adequate representation and the concomitant fiduciary obligations of class representatives to absent class members are due process requirements.[6] As was recently noted by the Seventh Circuit in *In Re General Motors Corporation Engine Interchange Litigation,* 594 F. 2d 1106, 1124 (7th Cir. 1979):

> "[Rule 23 imposes upon a trial court] a continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation . . . The trial court's duty to undertake such an inquiry arises from the requirement that it find that 'the representative parties will fairly

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[6] *Pettway* v. *American Cast Iron Pipe Co.,* 576 F. 2d 1157, 1176-78, 1215-17 (5th Cir. 1978); *Nat. Ass'n of Regional Medical Programs* v. *Matthews,* 551 F. 2d 340, 345-46 (D. C. Cir. 1976), *cert. den.,* 431 U. S. 954 (1977); *Greenfield* v. *Villager Industries, Inc.,* 483 F. 2d 824, 831-32 (3rd Cir. 1973); *Gonzales* v. *Cassidy,* 474 F. 2d 67, 74-76 (5th Cir. 1973).

> and adequately protect the interests of the class.' Fed.R.Civ.P. 23(a)(4). The trial court's duty is heightened by its responsibility to review the fairness of any compromise of a class action. *Id.* 23(c)."

Despite these rigorous due process standards, the Fifth Circuit in this litigation has enunciated a lesser and grossly inadequate due process standard with respect to the representation of subclasses with conflicting interests in conducting settlement negotiations:

> " '[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes.' In Re Corrugated Container Antitrust Litigation, 1980-1 Trade Reg. Rep. (CCH) ¶ 63,163 at 77,888 n. 10 (S. D. Tex. 1979). We think it clear that the primary settlement goal of each class was to cause defendants to agree to pay substantial compensation in exchange for the most limited possible release from their obligations and potential liabilities as parties to the litigation." (*In Re Corrugated Container Antitrust Litigation*, 643 F. 2d 195, 208 (5th Cir. 1981)) (App. p. A51)

Thus, the Fifth Circuit enunciated a test under which the "adequate representation" due process standard is satisfied by the payment of "substantial compensation" in settlement despite the negotiation of the settlements by counsel for one subclass for the benefit of two subclasses with diverse and conflicting interests.

In so doing, the Fifth Circuit patently ignored its own decision in *Clark* v. *Lomas & Nettleton Financial Corp.*, 625 F. 2d 49 (5th Cir. 1980), where the Court stated:

> "The board's conflict of interest could not be cured by judicial approval of the settlement terms. . . . terms . . ., while apparently "fair," may nonetheless have suffered from incestuous negotiation. It is indeed for this very reason that we bifurcate our review of derivative settle-

> ments, [citations omitted], by focusing on conflicting interests independently of the terms themselves. Our holding pretermits review of whether the terms actually negotiated were "reasonable" in relation to the claims surrendered. . . ." (659 F. 2d at 54)

Contrary to the Fifth Circuit's decision,[7] the container purchaser and sheet plant subclasses were not "united in asserting a common right." (643 F. 2d at 208) Rather, they had significantly diverse and conflicting interests throughout the course of this litigation, particularly in the conduct of settlement negotiations, a position reflected in the District Court's order establishing separate subclasses for container purchasers and sheet plants and its later refusal to remerge the subclasses into a unitary class.

The price fixing complained of by container purchasers and sheet plants, respectively, occurred at different industry levels and involved two different products, two different sets of prices, and in some cases two different sets of wrongdoers. Sheet plants, which purchased corrugated sheets and in turn manufactured corrugated containers that were sold to container purchasers, have no interest in proving a conspiracy affecting the price of corrugated containers. As sellers of corrugated containers, sheet plants participated in the corrugated container

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[7] The Federal courts have consistently held that under Rule 23(a)(4), F. R. Civ. P., the interests of a proposed class consisting of participants in a conspiracy and the victims thereof are antagonistic both as a matter of law and in fact and, therefore, cannot receive adequate representation within a single class nor may the participants adequately represent the interests of the victims or vice versa. *Hoyt Construction Co., Inc.*, v. *Alside Inc.*, 1978-2 Trade Cases (CCH) ¶ 62,243 at 75,534 (D. Minn. 1978); *Newberry* v. *The Washington Post Company*, 71 F. R. D. 25, 26 (D. D. C. 1976); *Zachman* v. *Erwin*, 186 F. Supp. 681, 689 (S. D. Tex. 1959).

See also, *Oakland County Hearing Aid Service* v. *Sonotone Corp.*, 1977-2 Trade Cases ¶ 61,567 at 72,285 (E. D. Mich. 1977); *Victorian Investors* v. *Responsive Environments Corp.*, 56 F. R. D. 543, 545 (S. D. N. Y. 1972).

conspiracy to the detriment and injury of container purchasers.[8] In light of these conflicts, the counsel for the container purchaser subclass who negotiated the settlements for the benefit of container purchasers and sheet plants could not adequately represent the interests of both in settlement negotiations.

Thus, the Fifth Circuit's decision is in conflict with the "adequate representation" due process requirement enunciated by this Court in *Hansberry* v. *Lee* and in the decisions of other Circuits.

B. Faced With Settlements Negotiated by Counsel in Conflict of Interest Positions and Divided Loyalties, the Approval Thereof by the District Court and the Fifth Circuit Creates Such an Appearance of Impropriety as to Require the Exercise by This Court of Its Supervisory Powers to Structure and Control Ethical Practice and Procedure Before the Federal Courts.

The federal courts have uniformly held that an essential ingredient of the "adequate representation" due process stan-

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[8] The Bill of Particulars filed by the Department of Justice in the related criminal cases (*United States* v. *International Paper Co.*, Cr. No. H-78-11 (S. D. Tex. filed January 25, 1978); *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S. D. Tex. filed January 25, 1978)) and made available to the plaintiffs in this litigation in July, 1978 identified as unindicted members of the alleged conspiracy employees of at least 13 different sheet plants. See Appendix G to *Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements* (Docket No. 645).

During the trial of the related criminal case, testimony revealed instances of sheet plant participation in defendants' corrugated container price fix: One witness testified that Mr. James Kowall, majority shareholder and president of Great Northern Packaging Corp., a representative of the sheet plant subclass, engaged in a pricing communication with a defendant. Testimony of Edward Schechter, Vol. 33, p. 111, Vol. 34, pp. 62-63. Julius M. Cohn, vice-president of Delta Container Corporation, a sheet plant, also testified concerning his participation in price exchanges with defendants during the period 1970 through April or May of 1976. Tr. Vol. 50, pp. 82-90; Vol. 51, pp. 93-106.

dard of Rule 23(a)(4), F. R. Civ. P., is that counsel for a representative party must give "vigorous and unqualified advocacy" in prosecuting a class action, including the negotiation of settlements.[9] As noted in *In Re Fine Paper Antitrust Litigation*, 617 F. 2d 22, 27 (3rd Cir. 1980):

> ". . . Under Rule 23, the trial judge has a constant duty, as trustee for absent parties in the class litigation, to inquire into the professional competency and behavior of class counsel. . . . The district court must renew its stringent examination of the adequacy of class representation throughout the entire course of the litigation."

Faced with uncontradicted evidence that the settlements in this litigation were negotiated by counsel in conflict of interest positions and with divided loyalties, the approval by the District Court and the Court of Appeals of these settlements was fatally flawed by their failure to inquire into and monitor such behavior of class counsel.

Pertinent to this duty are Canons 5 and 9 of the Code of Professional Responsibility of the American Bar Association: Canon 5, "A lawyer should exercise independent professional judgment on behalf of a client"; Canon 9, "A lawyer should avoid even the appearance of professional impropriety."[10]

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[9] *In Re Corrugated Container Antitrust Litigation*, 643 F. 2d 195, 208 (5th Cir. 1981); *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F. 2d 239, 247 (3rd Cir. 1975); *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 562-64 (2nd Cir. 1968). See also, *Dorfman* v. *First Boston Corp.*, 62 F. R. D. 466, 471 (E. D. Pa. 1974); *Berland* v. *Mack*, 48 F. R. D. 121, 127 (S. D. N. Y. 1969); *Dolgow* v. *Anderson*, 43 F. R. D. 472, 474 (E. D. N. Y. 1968); *Mersay* v. *First Republic Corp.*, 43 F. R. D. 465, 469-70 (S. D. N. Y. 1968); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F. R. D. 452, 456-57 (E. D. Pa. 1968); *State of Minnesota* v. *United States Steel Corp.*, 44 F. R. D. 559, 572 (D. Minn. 1968).

[10] Under Disciplinary Rule 5-106, "a lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each

(Footnote continued on following page.)

The patent impropriety of counsel for the Atlas Container sheet plant in representing both container purchaser and sheet plant clients is but one example of dubious ethics in the representation of absent class members. Of even greater and more damaging impact is the course taken by counsel for the container purchaser subclass in negotiating settlements for both container purchasers and sheet plants.

Where counsel for the container purchaser subclass purportedly negotiating settlements only on behalf of the container purchasers had a *sub rosa* agreement that allocated to the sheet plant class and effectively stripped the container purchaser subclass of their vested right to a portion of the settlement funds, counsel clearly failed to exercise the undiluted loyalty to the container purchaser subclass mandated by Cannon 5. Further, the very existence of the *sub rosa* agreement was never disclosed in the notice to class members.

In view of the failure of the District Court and the Fifth Circuit to inquire into and monitor the behavior of class counsel in conflict of interest positions and with divided loyalties in negotiating the settlements in this litigation, the approval thereof by the lower courts creates such an appearance of impropriety as to require the exercise by this Court of its supervisory powers to structure and control ethical practice and procedure before the Federal courts.

(Footnote continued from preceding page.)

client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement."

C. In Approving the Settlements and a Formula for the Allocation of Settlement Funds, the District Court Applied Criteria of Law for Determining Whether the Settlements Are Fair, Reasonable and Adequate in Conflict with the Decisions of This Court and Other Circuits.

When the Fifth Circuit remanded these actions to the District Court for additional findings of fact and conclusions of law, the Court set up a three step process for evaluating whether the settlements were fair, reasonable and adequate, as follows:

> First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings of plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate. (643 F. 2d at 212)

1. In approving the settlements and a formula for the allocation of the settlement funds, the district court applied criteria of law in conflict with the decisions of this Court and lower courts regarding the proper measure of damages in civil price fixing cases.

Since *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U. S. 396 (1906), a treble damage case, this Court has recognized that "a person whose property is diminished by a payment of money wrongfully induced is injured in his property." This principle has evolved through subsequent decisions of this Court to the present recognition that the damages suffered by a direct purchaser suing under Section 4 of the Clayton Act are measured by the full amount of the overcharge paid by it.[11]

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[11] See, *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 262-63 n. 14 (1972); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 489 (1968). See also, *Alabama* v. *Blue Bird Body Co., Inc.*, 573 F. 2d. 309, 323 (5th Cir. 1978); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 933 (S. D. N. Y. 1965).

In accordance with this body of law, plaintiffs in numerous purchaser-supplier price fixing cases have successfully established the amount of a price overcharge through a comparative analysis of prices prevailing during the alleged conspiracy and prices prevailing during a non-conspiratorial period.[12]

Notwithstanding widespread judicial recognition that an analysis of price levels and the amount by which a conspiracy has inflated price levels is crucial to arriving at any informed estimate of damages in a purchaser-supplier price fixing case, the District Court and the Fifth Circuit have approved settlements in a major national class action price fixing case based upon an analysis of defendants' profits and losses, which are more a measure of benefit to the defendants than damage suffered by the class members.[13]

Numerous courts have emphatically rejected the premise that profits and losses are somehow indicative of the effect which a price fixing conspiracy has on its victims. In the landmark *Electrical Equipment Conspiracy* cases, courts throughout the country refused to accept evidence of defendants' profits, losses and costs as irrelevant to the damage issue or what prices would have been in the absence of a price fixing conspiracy. The courts rejected such evidence absent a showing that the data proffered had probative value, i.e., in the absence of a showing that defendants' actual costs during the conspiracy

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[12] See, e.g., *Armco Steel Corp.* v. *State of North Dakota*, 376 F. 2d 206, 211 (8th Cir. 1967); *Bray* v. *Safeway Stores, Inc.*, 392 F. Supp. 851, 864 (N. D. Cal. 1975); *Wall Board Products Co.* v. *National Gypsum Co.*, 357 F. Supp. 382 (N. D. Cal. 1973); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 933 (S. D. N. Y. 1965). See also, *Commonwealth Edison Co.* v. *Allis Chalmers Manufacturing Co.*, 40 F. R. D. 96, 99 (N. D. Ill. 1966).

[13] Telling indicia of the gross inadequacy of the settlements approved by the District Court exist in a comparison of the recoveries achieved by the class members and the opt-outs. The class members will realize a recovery of only approximately 2% as compared to 10-13% for the opt-outs for a 9-10 year period (1969-1977).

were the costs that would have been incurred absent the conspiracy, and an offer of profit, loss and cost data for all significant market factors. See, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 40 F. R. D. 96 (N. D. Ill. 1966) and cases cited therein. The profit-based economic impact studies offered in support of the settlements and used by the District Court to establish a "range of possible recovery" failed in every regard to meet this test.

Further, the District Court approved a formula for the allocation of the pre-January 5, 1979 and the "hardship" settlement funds between the two subclasses according to their claimed dollar purchases of containers and sheets, without any showing of the estimated relative damages sustained by container purchasers and sheet plants, despite recognition by the court that the relative damages are likely to be different:[14]

> "Whether the measure would be greater or smaller is unclear. Evidence presented in the trial of those indicted could support an argument that sheet plants are entitled to less than other purchasers or even, at the extreme, to no recovery at all." (*In Re Corrugated Container Antitrust Litigation*, 1980-1 Trade Cases (CCH) ¶ 63,163, p. 77,788 n. 9 (S. D. Tex. 1979)) (App. p. A13)

As the *Manual For Complex Litigation* notes:

> "... In the absence of reliable economic data concerning damages suffered by each class and subclass as the result of the alleged conduct, a rational determination of what is fair, reasonable and adequate cannot be made.
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[14] As sellers of corrugated containers, sheet plants participated in and benefited economically from the corrugated container conspiracy to the detriment and injury of container purchasers. See discussion at pp. 14-15, *supra*.

> "... [There] may be cases in which some of the plaintiff classes not only were not damaged but may have profited as a result of the illegal practices. Only an examination of reliable economic data can provide the information absolutely necessary to the performance of the judicial function in approving or disproving the settlement in such cases." (Part 1, § 1.46, pp. 58-59)

Thus, in approving the settlements in this litigation and the formula for the allocation of the pre-January 5, 1979 and the "hardship" settlement funds between the two subclasses, the District Court applied criteria of law in conflict with the decisions of this Court and the lower courts regarding the proper measure of damages in civil price fixing cases.

2. The failure of the district court to fairly assess plaintiffs' likelihood of prevailing at trial was a serious departure from usual and accepted standards of judicial review of class action settlements in conflict with decisions of the federal courts.

On remand, the Fifth Circuit instructed the District Court to make further findings regarding "the likelihood that plaintiffs would prevail at trial." (643 F. 2d at 212)

The necessity for evaluating the strength of a plaintiff's case on the merits in order to determine whether the amount offered in settlement is adequate has been repeatedly emphasized by the courts.[15]

Necessarily, such an evaluation must fairly weigh both the positive and negative factors which may influence the outcome of the trial. However, the District Court chose only to evaluate the weaknesses of plaintiffs' case, going so far as to grasp by

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[15] See, e.g., *Liebman* v. *J.W. Peterson Coal & Oil Co.*, 73 F. R. D. 531 (N. D. Ill. 1973); *Percodani* v. *Riker-Maxon Corp.*, 50 F. R. D. 473 (S. D. N. Y. 1970). See also, *Girsh* v. *Jepeson*, 521 F. 2d 153, 156-57 (3rd Cir. 1975).

"judicial notice" at factors that ranged from presumptions about the nature of the corrugated container industry volunteered by the defendants, through pre-sentence reports from the criminal cases that were not subject to review and comment by the petitioner-objectors.

The District Court placed considerable importance on acquittals in the related criminal cases, ignoring the lower standard of proof required in the civil class actions and its own finding at the criminal trial that the government had *prima facie* established a price fixing conspiracy by a "preponderance of the evidence." *United States* v. *International Paper Co., et al.*, Cr. No. H-78-11 (S. D. Tex. April 5, 1979), Tr. Vol. 105, p. 7.

In their entirety, the District Court's findings—and the Fifth Circuit's blithe acceptance thereof—clearly demonstrate less than a full and fair appraisal of the civil class actions.

The failure of the District Court to fairly assess, pursuant to applicable civil standards of proof, the probability of plaintiffs prevailing at trial was a serious departure from the usual and accepted standards of judicial review of class action settlements in conflict with decisions of the Federal courts.

D. With the District Court Having Applied Incorrect Criteria of Law in Approving the Settlements, the Fifth Circuit, in Conflict with Its Own Decisions and Decisions of the Third, Seventh and Tenth Circuits, Improperly Limited Its Scope of Review to the Narrow Review Which Applies to the Exercise of Discretion and Thereby Failed to Exercise Its Independent Judgment as Required by Law.

The Fifth Circuit, in its review and approval of the settlements, improperly limited its scope of review to the narrow review as to whether the District Court had "clearly abused its discretion." (643 F. 2d at 207; 659 F. 2d at 1325)

The Federal courts have consistently held that where the District Court's orders are based on the application of incorrect criteria of law, the scope of appellate review is not limited to the narrow review which applies to the exercise of discretion, but rather the correctness of such rulings of law is a matter on which the Court of Appeals must exercise its independent judgment.[16] As stated by the Third Circuit in *United States* v. *60.14 Acres of Land, etc., supra,* where the lower court applied a general rule of law which it believed was binding and which would render an entire class witnesses incompetent:

> "It is of course well established that the determination of the competency of an expert witness lies generally in the discretion of the trial judge and that his decision will not be interfered with unless such discretion is abused or its exercise is manifestly erroneous. [citations omitted] In the present case, however, what is involved is not whether the trial judge in his discretion accurately evaluated the factual circumstances . . . but rather the correctness of a general rule of law . . . Such a ruling of law, though an element in the decision . . . , is, of course, not restricted to the narrow review which applies to the exercise of discretion. [citations omitted]"
> (362 F. 2d at 663)

Thus, "the application of incorrect criteria of law to the evidentiary facts is reviewable on appeal as a matter of law."[17] and "is a matter on which [the Court of Appeals] must exercise its independent judgment."[18]

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[16] *Fuentes* v. *Reilly,* 590 F. 2d 509, 513 (3d Cir. 1979); *Miley* v. *Delta Marine Drilling Co.,* 473 F. 2d 856, 858 (5th Cir. 1973), *cert. den.,* 414 U. S. 871 (1973); *United States* v. *60.14 Acres of Land, etc.,* 362 F. 2d 660, 663 (3d Cir. 1966); *United States* v. *Featherston,* 325 F. 2d 539, 543 (10th Cir. 1963); *Hoover Company* v. *Mitchell Manufacturing Company,* 269 F. 2d 795, 805 (7th Cir. 1959); *United States* v. *Hoper,* 242 F. 2d 468, 471 (7th Cir. 1957); *Roth* v. *Bird,* 239 F. 2d 257, 261-62 (5th Cir. 1956).

[17] *Hoover Company* v. *Mitchell Manufacturing Company, supra* at 805.

[18] *United States* v. *Hoper, supra* at 471.

As set forth above, the District Court's approval of the settlements in this litigation was based on the application of incorrect criteria of law regarding the "adequate representation" due process requirement enunciated by this Court in *Hansberry* v. *Lee* and in the decisions of other Circuits as well as incorrect criteria of law for determining whether settlements are fair, reasonable and adequate. Thus, the Fifth Circuit, in conflict with its own decisions and decisions in the Third, Seventh and Tenth Circuits, improperly limited its scope of review to the narrow review which applies to the exercise of discretion and thereby failed to exercise its independent judgment as required by law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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